ORIGINAL

# IN THE SUPREME COURT OF OHIO

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| REBEKAH R. RADATZ, individually and on behalf of all others similarly situated | ) | CASE NO. 14-1126 |
| Plaintiff/Appellee, | ) | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. CA-13-100205 |
| v. | ) | |
| FEDERAL NATIONAL MORTGAGE ASSOCIATION | ) | Cuyahoga County Court of Common Pleas Case No. CV-03-507616 |
| Defendant/Appellant. | ) | |

## MERIT BRIEF OF APPELLANT FEDERAL NATIONAL MORTGAGE ASSOCIATION


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## INTRODUCTION

In 1938, in response to the Great Depression, Congress chartered the Federal National Mortgage Association ("Fannie Mae") as a government-sponsored enterprise to fulfill a crucial, national purpose—to support the secondary mortgage market and thereby make mortgage finance available more broadly and at lower cost. In 2008, in response to the Great Recession, Congress acted again to protect the nation's housing market, creating the Federal Housing Finance Agency ("FHFA" or the "Agency") to regulate Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). As with other federal financial regulators, Congress empowered FHFA to issue cease-and-desist orders to prevent its regulatees from acting in ways that would be "unsafe and unsound" or in violation of law ("Orders" or "Enforcement Orders"). 12 U.S.C. 4631(a)(1), (c)(2). Of dispositive relevance here, Congress precluded judicial interference with such orders: FHFA's governing statute provides that "no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any [such] notice or order, * * * or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. 4635(b).

This case involves just the sort of judicial interference that Congress expressly forbade. Specifically, in this case, to enforce a statute protecting Fannie Mae and Freddie Mac from liability "for any amounts in the nature of penalties" while in conservatorship, FHFA issued a final Enforcement Order prohibiting them from paying "for any reason, directly or indirectly, any fines or penalties imposed by any state mortgage satisfaction law * * * for noncompliance." 12 U.S.C. 4617(j)(1), (4); Order; Appx. A-039. Further, to assure that the Order reflected and enforced its specific determination that the relief sought by plaintiffs in this case is "in the nature of penalties," FHFA expressly prohibited Fannie Mae from "paying, for any reason, directly or indirectly, any amount pursuant to any judgment" in this action. *Id.* Following issuance of the

final Order, the trial court correctly dismissed the case, but the Eighth District reversed, holding—in direct conflict with FHFA's final Enforcement Order—that a financial award pursuant to a judgment in this action would not constitute a penalty.

Therefore, this case presents a straightforward question: Does Section 4635(b) preclude courts from affecting, reviewing, modifying, or negating FHFA's Order? It does.

Under Section 4635(b) and a substantively identical statute applicable to other federal financial regulators, courts simply may not second-guess the purpose, substance, or effect of Enforcement Orders, nor may they restrict or invalidate them. Yet that is exactly what the Eighth District did here—it not only rejected FHFA's determination that a judgment in this case would amount to a penalty, but also allowed this case to proceed to a potential judgment even though the Order expressly precludes Fannie Mae from paying one. That precedent, if permitted to stand, will directly undermine the efficiency and effectiveness of the comprehensive supervisory and enforcement structure Congress enacted to empower federal regulators like FHFA to act decisively to protect the financial system. This Court must apply the federal statute that precluded the Eighth District and the trial court from reviewing FHFA's Order, and therefore direct dismissal of this action.

Even if FHFA's Order were not immune from judicial review by virtue of Section 4635(b), as it is, dismissal would be required because the Ohio statute at issue in this case imposes a liability in the nature of a penalty. In reaching a contrary conclusion, the Eighth District erroneously premised its statutory analysis on state law. But federal law governs, and it establishes that such an award would be penal. Even under state law, the Eighth District's conclusion would require reversal, because it also disregards this Court's precedent that the

determination of whether a judgment constitutes a penalty must be made from the perspective of the payor—in this case, Fannie Mae. Dismissal is therefore required.

## STATEMENT OF FACTS

Congress created Fannie Mae as a federally chartered, but privately owned, enterprise to carry out vital public policies: to create a secondary market for residential mortgage financing, stimulate the flow of private capital into housing, and improve the affordability of homeownership. 12 U.S.C. 1716. Those crucial mandates were directly threatened by the financial crisis in 2008. In response, Congress enacted a comprehensive regulatory scheme to protect the national housing market. The questions presented in this case implicate the heart of that regulatory scheme. The following legal and factual background is relevant to resolving those questions.

### A. Statutory Background

In response to the greatest financial crisis this Nation has seen in decades, Congress enacted the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654, on July 30, 2008 ("HERA"), and created FHFA as the regulator and supervisor of Fannie Mae and Freddie Mac. 12 U.S.C. 4511. HERA amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. 102-550, 106 Stat. 3672, and transitioned regulatory oversight of Fannie Mae and Freddie Mac from the Office of Federal Housing Enterprise Oversight ("OFHEO") to FHFA. Under HERA, FHFA's Director placed Fannie Mae and Freddie Mac into FHFA's conservatorship on September 6, 2008 "for the purpose of reorganizing, rehabilitating or winding up the[ir] affairs." 12 U.S.C. 4617(a)(2). During conservatorship, FHFA acts both as Regulator and Conservator of Fannie Mae and Freddie Mac. As Regulator, FHFA is charged with maintaining the safety and soundness of Fannie Mae and

Freddie Mac and to ensure that "each regulated entity complies with . . . the rules, regulations, guidelines, and orders issued under [HERA]." *Id.* 4513(a)(1)(B)(iii).

Congress empowered FHFA, like other federal financial regulators, to issue cease-and-desist orders to prevent its regulated entities such as Fannie Mae from violating any law. *See* 12 U.S.C. 4631(a)(1), (c)(2) (providing that if "the Director has reasonable cause to believe [Fannie Mae] is about to violate, a law, rule, regulation, or order," he "may issue and serve upon [Fannie Mae] an order requiring [Fannie Mae] to cease and desist from any such practice or violation"); *see also* 12 U.S.C. 1818(b)(1) (materially identical provision applicable to the Federal Deposit Insurance Corporation ("FDIC"), Office of the Comptroller of the Currency ("OCC") and Board of Governors of the Federal Reserve System ("FRB")).

FHFA issued the Order at issue in this case pursuant to Section 4631. And, particularly important here, Congress sought to provide FHFA with the broadest possible latitude when exercising its regulatory authority by precluding courts from reviewing, invalidating, or in any way altering FHFA's Enforcement Orders. Congress mandated that "no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order under section 4631 . . . or to review, modify, suspend, terminate, or set aside any such notice or order" issued by FHFA. 12 U.S.C. 4635(b). Congress enacted Section 4635(b) in 1992 as part of the Safety and Soundness Act and reenacted this jurisdictional bar when it enacted HERA. For nearly fifty years, Congress has mandated a similar jurisdictional bar to bolster the regulatory authority of other federal financial institution regulatory agencies in overseeing financial institutions. *See* 12 U.S.C. 1818(i)(1) (materially identical jurisdictional bar applicable to the FDIC, OCC, and FRB since 1966).

As described below, the order at issue here concerns the so-called statutory "Penalty Bar," which Congress enacted to preserve the assets of Fannie Mae in conservatorship by barring the payment of any amount "in the nature of" penalties. Specifically, HERA provides that the Conservator "shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." 12 U.S.C. 4617(j)(4). This Penalty Bar applies to Fannie Mae while under FHFA's conservatorship. *See Nevada v. Countrywide Home Loans Servicing, LP*, 812 F.Supp.2d 1211, 1218 (D.Nev.2011) (holding that, pursuant to section 4617(j)(4), "while under the conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is.").

The Ohio statute at issue requires a mortgagee to record the fact of the satisfaction of a residential mortgage in the appropriate county recorder's office. R.C. 5301.36(B). R.C. 5301.36(C) provides: "If the mortgagee fails to comply with division (B) of this section, the mortgagor may recover, in a civil action, damages of two hundred fifty dollars. This division does not preclude or affect any other legal remedies that may be available to the mortgagor." As the statute makes clear, a mortgagor can seek in addition actual damages beyond the $250 authorized by statute.

**B. The Complaint**

Plaintiff Rebekah Radatz filed this class action against Fannie Mae on behalf of herself and all others similarly situated in 2003. (*See* Compl. ¶ 1.) The sole claim raised in the Complaint alleges that Fannie Mae is liable under Ohio law for the untimely recording of mortgage satisfactions under R.C. 5301.36. That statute requires a mortgagee to record the fact of the satisfaction of a residential mortgage in the appropriate county recorder's office within ninety days from the date of the satisfaction. R.C. 5301.36(B). Radatz maintains that she and

each member of the class paid off a mortgage where Fannie Mae was the mortgagee, but Fannie Mae did not record the satisfaction of the mortgage within the 90-day period required by Ohio law. (*See* Compl. ¶¶ 3, 4.)

On behalf of a certified class, Radatz seeks to recover statutory sums pursuant to R.C. 5301.36(C), which provides that if a mortgagee fails to timely record the satisfaction of a mortgage, "the mortgagor may recover, in a civil action, damages of two hundred fifty dollars," without "preclud[ing] or affect[ing] any other legal remedies that may be available to the mortgagor." The class period for which Radatz seeks to recover begins on May 9, 1997. *See Radatz v. Federal Natl. Mtge. Assn.*, 176 Ohio App.3d 319, 2008-Ohio-1937, 891 N.E.2d 1236, ¶ 4 (8th Dist.) (order affirming class certification); Appx. A-025. Subsequent to class certification, Congress enacted HERA, and just over a month later, FHFA placed Fannie Mae into Conservatorship.

### C. FHFA's Order and Dismissal of the Complaint

On March 9, 2013, FHFA issued a cease-and-desist order (the "Order") pursuant to its regulatory authority under 12 U.S.C. 4631, prohibiting both Fannie Mae and Freddie Mac from violating "a law"—here, the Penalty Bar—by paying "for any reason, directly or indirectly, any fines or penalties imposed by any state mortgage satisfaction law on [Fannie Mae or Freddie Mac] for noncompliance." (Order; Appx. A-039.) Based on FHFA's determination that the statutory sums sought by Ms. Radatz and the class pursuant to R.C. 5301.36 are "in the nature of penalties" within the meaning of the Penalty Bar, the Order explicitly prohibits Fannie Mae from violating 12 U.S.C. 4617(j)(4) "by paying, for any reason, directly or indirectly, any amount pursuant to Ohio Code 5301.36 or pursuant to any judgment in connection with" the *Radatz* case. *Id.*

To ensure compliance with FHFA's Order, Fannie Mae moved to dismiss the Complaint on the ground that "no court," including the trial court, could exercise jurisdiction over Plaintiff's complaint because the trial court could not enter any judgment in favor of Plaintiff without "review[ing], modify[ing], suspend[ing], terminat[ing], or set[ting] aside" the Order in direct violation of 12 U.S.C. 4635(b). The trial court agreed and dismissed the Complaint for lack of subject-matter jurisdiction pursuant to Civ.R. 12(H)(3). Plaintiff appealed.

**D. The Decision Below**

The Eighth District reversed on May 22, 2014. Although Section 4635(b) prohibits judicial review or modification of orders issued under Section 4631, the Eighth District nevertheless undertook its own independent review of the Order. While FHFA determined in the Order that any judgment in this lawsuit would amount to a penalty in violation of the Penalty Bar—and accordingly prohibited Fannie Mae from "paying, for any reason, directly or indirectly, any amount pursuant to [R.C.] 5301.36 or pursuant to any judgment [in this pending lawsuit]"—the Eighth District concluded that Fannie Mae was prohibited from paying only those amounts that the *Eighth District* independently determines to be in the nature of penalties or fines. *Radatz v. Federal Natl. Mtge. Assn.*, 2014-Ohio-2179, 11 N.E.3d 1230, ¶¶ 9-11 (8th Dist.), Appx. A-011–A-013. The Eighth District then ruled that the amounts imposed by R.C. 5301.36(C) do not constitute a penalty under federal or state law, and thus concluded that Fannie Mae *could*—in direct contravention of FHFA's specific prohibition—lawfully satisfy a judgment in this case. *See id.* at ¶¶ 9-19, Appx. A-011–A-018. In support of its decision to review the Order, the Eighth District concluded that nothing in the *Penalty Bar* provision precludes the court from reviewing the validity of the Order, even though it is not the Penalty Bar provision but the *jurisdictional* bar of Section 4635(b) that expressly bars courts from doing just that. *Id.* at ¶ 9, A-011. The Eighth District also reasoned that the Order "contemplated" a judgment when

it instructed Fannie Mae not to pay any amount pursuant to any judgment, so a judgment "could not possibly affect" the Order. *Id.* at ¶ 20, A-018–A-019.

Fannie Mae timely filed an appeal to this Court on July 7, 2014, and the Court accepted review on October 22, 2014.

## LAW AND ARGUMENT

**Proposition of Law I: Under 12 U.S.C. 4635(b), no federal or state court has jurisdiction to review or affect a cease-and-desist order issued by the Federal Housing Finance Agency in its capacity as Regulator.**

### A. The Relevant Federal Statutory Scheme Requires Dismissal

Congress unequivocally stated its intention to withdraw jurisdiction from all federal and state courts to review, modify, or affect enforcement orders issued by FHFA in its capacity as Regulator: "[N]o court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order" issued by FHFA pursuant to 12 U.S.C. 4631(a), nor may any court "review, modify, suspend, terminate or set aside any such * * * order." 12 U.S.C. 4635(b). This clear statement of federal preemption prevails over any conflicting state-law cause of action or remedy by virtue of the Constitution's Supremacy Clause, Article VI, Section 2. *See generally PNH Inc. v. Alfa Laval Flow, Inc.*, 130 Ohio St.3d, 2011-Ohio-4398, 958 N.E.2d 120, syllabus & ¶ 31.

Here, FHFA exercised its enforcement authority under 12 U.S.C. 4631(a) to issue an order effectuating its determination that payment by Fannie Mae, while under FHFA's conservatorship, of any amount pursuant to R.C. 5301.36 in this case would constitute a penalty in "violat[ion]" of "a law," 12 U.S.C. 4631(a)—specifically, the Penalty Bar in 12 U.S.C. 4617(j)(4). Plaintiff cannot dispute that FHFA issued the Order pursuant to its comprehensive regulatory authority under Section 4631(a). (*See* Order, Appx. A-039 (stating that the Order is issued "[p]ursuant to 12 U.S.C. § 4631").) Because the Regulator issued the Order pursuant to

its statutory authority to issue cease-and-desist orders, "no court" has jurisdiction to review, modify, or affect it in any way. 12 U.S.C. 4635(b).

When Congress enacted the Safety and Soundness Act in 1992, it modeled the statutory jurisdictional bar at issue—12 U.S.C. 4635(b)—after the virtually identical jurisdictional bar that it enacted in 1966 with respect to enforcement orders issued by other federal financial regulators, including the OCC, the FRB, and the FDIC. *See* 12 U.S.C. 1818(i)(1) ("[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order."). Courts applying Section 1818(i) have enforced its sweeping ouster of jurisdiction whenever relief sought in a judicial proceeding, such as the relief sought in this litigation, *could* affect an order. *See Board of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44-45, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991) (holding that Section 1818(i) provides "clear and convincing evidence" of congressional intent to strip jurisdiction); *DeNaples v. Office of the Comptroller of Currency*, 404 F. App'x 609, 613 (3d Cir.2010) ("§ 1818(i)(1) imposes an expansive prohibition, stripping federal courts of jurisdiction whenever a determination *could* affect an agency decision.") (emphasis added); *see also Newton v. American Debt Servs., Inc.*, __ F.Supp.3d ___, N.D.Cal. No. 3:11-cv-03228, 2014 U.S. Dist. LEXIS 173741, 24 (Dec. 16, 2014) (rejecting plaintiff's request to put the court "in a position of adjudicating and, in that process, interpreting the [FDIC's] Order," because this "most certainly would 'affect . . . enforcement' of the Order" in violation of Section 1818(i)(1) (quoting 12 U.S.C. 1818(i)(1)); *Doral Bank v. Federal Deposit Ins. Corp.*, ___ F.Supp.3d ___, D.P.R. Civ. No. 14-1570, 2014 U.S. Dist. LEXIS 127741, 17 (Sept. 11, 2014) (concluding that Section 1818(i) withdrew jurisdiction to review an FDIC consent order because the court's interpretation

of the order "may affect the FDIC's rights and obligations under the order," and noting that "[t]he request for relief need not be in direct contravention of the Consent Order to affect enforcement of the order").

Accordingly, courts have applied Section 1818(i) to dismiss complaints that demanded relief that would either "affect * * * review, modify, suspend, terminate, or set aside" a federal banking agency's cease-and-desist order. *See Carlton v. Firstcorp, Inc.*, 967 F.2d 942, 946 (4th Cir.1992) (affirming dismissal of complaint seeking to enjoin enforcement of a temporary cease-and-desist order by the Office of Thrift Supervision); *First Natl. Bank of Grayson v. Conover*, 715 F.2d 234, 237 (6th Cir.1983) (holding that the district court lacked jurisdiction over bank's suit for injunctive relief to prevent the suspension of two of its officers pursuant to an order by the OCC).

Indeed, the federal court in *American Fair Credit Association v. United Credit National Bank*, 132 F.Supp.2d 1304, 1312 (D.Colo.2001) ("*AFCA*"), ordered dismissal in circumstances indistinguishable from the present case. The *AFCA* plaintiff asserted various contract and tort claims against a national bank. The national bank and its primary federal regulator, the Office of the Comptroller of the Currency, subsequently entered into a consent order prohibiting the national bank from making any payments pursuant to the plaintiff's contract or as damages for the plaintiff's tort claims. Recognizing the potential of the litigation to "affect" the consent order, the court ruled that it was divested of subject-matter jurisdiction over the plaintiff's claims, explaining that, "[i]f this case went forward as currently pled and Plaintiff prevailed, Defendant [national bank] would be required to pay money damages included in the judgment in direct contravention of the [consent order]. . . . Because such an outcome would 'affect . . . the

. . . enforcement of an[] order' issued by the OCC, 12 U.S.C. § 1818(i)(1), jurisdiction does not exist over those claims." *Id.*

The *AFCA* Court correctly determined this issue, and there is no meaningful difference between the circumstances here and those that compelled dismissal in *AFCA*. In the final Enforcement Order that the Eighth District effectively nullified, FHFA prohibited Fannie Mae from paying "any fines or penalties imposed by any state mortgage satisfaction law on [Fannie Mae] for noncompliance." (Order, Appx. A-039.) To ensure that there was no ambiguity whether FHFA had intended its Order to apply to any award granted Plaintiff in this litigation, the Order expressly barred Fannie Mae from paying "any amount pursuant to [R.C.] 5301.36, or pursuant to any judgment in connection with [the *Radatz* litigation]." *Id.* Therefore, allowing Plaintiff to maintain her lawsuit, which seeks issuance of a judicial order compelling Fannie Mae to make monetary payments pursuant to R.C. 5301.36, is in direct violation of the Order explicitly forbidding Fannie Mae from making any such payments. Just as in *AFCA*, any judgment granting Plaintiff's requested relief would be in direct contravention of the Order, and would therefore unlawfully "affect" its enforcement. Consistent with *AFCA* and the other federal cases discussed above, the trial court properly dismissed the case because it lacked jurisdiction pursuant to Section 4635(b) to grant the relief Plaintiff seeks.

Under HERA, the exceptions to this statutory withdrawal of jurisdiction are limited, and inapplicable here. Only a *party* to a cease-and-desist order may obtain judicial review of the order, and that review may only take place under limited circumstances. *See* 12 U.S.C. 4634. Third parties, such as Plaintiff, may not seek judicial review of a final enforcement order. *See, e.g.*, *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035, 1039 (D.C.Cir.1998) (foreclosure of review of temporary order extends to third parties affected by the order); *Law Offices La Ley*

*Con John H. Ruiz, P.A. v. Rust Consulting Inc.*, 982 F.Supp.2d 1307, 1312 (S.D.Fla.2013) (holding that relief sought by non-party was barred by Section 1818(i) where it "certainly would affect the enforcement of, and modify the terms of the [consent orders]").

### B. The Statutory Scheme Makes No Distinction Between Consent Orders and Other Orders

The cease-and-desist Order in this case was entered into with the consent of Fannie Mae. *See* 12 U.S.C. 4631(c), 4633(a)(4) (providing that the regulated entity may assent to the issuance of a cease-and-desist order, in which case the order becomes final and effective upon consent). Federally regulated financial institutions routinely enter into consent orders with their primary federal regulator. *See, e.g.*, *In re JPMorgan Chase Mtge. Modification Litigation*, 880 F.Supp.2d 220, 224 (D.Mass.2012), fn. 10 (noting that "[i]n April of 2011, [the financial institution] entered into a Consent Order with the [OCC], the [FRB], and the Office of Thrift Supervision [], pursuant to 12 U.S.C. § 1818(b)" and that "[t]he statute gives the OCC the authority to address by consent orders 'unsafe or unsound' practices or violations of law by financial institutions").

Judicial interference with consent orders is subject to the same jurisdictional bar as all other cease-and-desist orders issued by federal financial regulators. *See Henry v. Office of Thrift Supervision*, 43 F.3d 507, 512 (10th Cir.1994) (holding that Office of Thrift Supervision consent orders directed against the former director of a savings and loan association were "orders" within the meaning of 12 U.S.C. 1818(i)). Indeed, the statutory language enacted by Congress divesting courts of jurisdiction makes *no* distinction between consent orders and all other orders.

### C. Application of the Federal Statutory Scheme to This Case Requires Dismissal

Because the Regulator issued the Order pursuant to its enforcement authority under 12 U.S.C. 4631, the *only* relevant question for the trial court and the Eighth District was whether a judgment awarding some or any of the judicial relief requested by Radatz would "affect" the

Order. *See* 12 U.S.C. 4635(b). In answering this straightforward "yes or no" question, neither court was permitted to "review" the merits of the Regulator's factual and legal determinations underlying the Order. Indeed, both were statutorily barred from doing so. *Id.* The trial court correctly answered this inquiry in the affirmative because entering judgment against Fannie Mae necessarily would compel it to violate the Regulator's outstanding final and effective Order, which explicitly commands Fannie Mae not to pay "*any* amount pursuant to [R.C.] 5301.06 or pursuant to *any* judgment in connection with [the Radatz litigation]." (Order (emphasis added), Appx. A-039.)

The Eighth District's reversal of the trial court's dismissal conflicts with the plain statutory language, and with case law in which courts have ordered dismissal of litigation in which the requested relief would cause the court to review or affect a regulator's order. *See, e.g.*, *Rhoades v. Casey*, 196 F.3d 592, 597 (5th Cir.1999) ("[I]f the district court had considered [Defendant's] defense and declared the [Office of Thrift Supervision] order void and therefore unenforceable, that decision would have been tantamount to the district court's modifying or terminating the OTS order. This is an action which is expressly prohibited by § 1818(i)."); *Bakenie v. JPMorgan Chase Bank, N.A.*, C.D.Cal. No. SACV-12-60 JVS, U.S. Dist. LEXIS 137809, 10-11 (Aug. 6, 2012) ("Although [Defendants] are not parties to the Consent Order, the Court finds that Section 1818(i)(1) precludes jurisdiction as to Plaintiffs' claim against them because the Consent Order expressly covers the conduct of third-party providers."); *Law Offices La Ley Con John H. Ruiz, P.A.*, 982 F.Supp.2d at 1312 (holding that relief sought by non-party to the Consent Order was barred by Section 1818(i) where it "certainly would affect the enforcement of, and modify the terms of the Consent Orders and the Amendments"); *Anderson v. Deutsche Bank Natl. Trust Co.*, E.D.Mich. Civ.A.No. 13-cv-12854, U.S. Dist. LEXIS 32550, 11-

12 (Mar. 13, 2014) (contrasting cases where "[a]pplicable precedent reveals a distinction between cases in which the relief sought by the plaintiff was already addressed by the Consent Order, resulting in the district court being divested of jurisdiction over the matter," with "cases in which the Consent Order is silent as to the relief sought by the plaintiff, resulting [in] the district court's retention of jurisdiction"). In short, the trial court's dismissal of the action, which the Eighth District improperly reversed, was mandated by a straightforward application of HERA's plain language, as confirmed by federal precedent.

The Eighth District's decision rests on a fundamental misunderstanding of the governing federal statutory scheme. Despite the clear statutory prohibition against "review[ing]" or "affect[ing]" the Order, 12 U.S.C. 4635(b), the appellate court erroneously concluded that Congress had not divested it of jurisdiction to review whether FHFA as Regulator correctly determined, in an order issued under Section 4631(a), that paying a judgment in this case would violate the Penalty Bar. The plain text of Section 4635(b) deprives *all* courts—state and federal—of jurisdiction to review or interfere in any way with such Enforcement Orders.

The Eighth District's opinion is premised on two basic errors regarding the nature of the statutory scheme and the Order itself: (1) it conflated the Penalty Bar with the Regulator's statutory enforcement authority, and (2) it misconstrued the order in a way that allowed the court to make an independent determination of whether Fannie Mae's payment of a judgment in this case would violate the Penalty Bar.

### 1. The Eighth District Conflated the Penalty Bar with the Regulator's Statutory Enforcement Authority

First, the Eighth District conflated (a) the Penalty Bar, which prohibits the imposition of liability against Fannie Mae and Freddie Mac while in conservatorship "for any amounts in the nature of penalties or fines"; with (b) the Regulator's statutory enforcement authority, which

allows the Regulator to issue cease-and-desist orders prohibiting Fannie Mae from engaging in conduct that the Regulator determines would be unsafe or unsound or would violate any law, including the Penalty Bar. *See Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, at ¶ 13, Appx. A-014–015 ("[W]e assume for the sake of this appeal that the conservator had authority to enter the consent order mimicking the immunity language of 12 U.S.C. 4617(j)(4)."); *see also id.* at ¶ 12, Appx. A-014 ("[T]he prohibition against assessing penalties or fines against the FHFA or Fannie Mae, however, is not grounds to divest the court of jurisdiction. * * * Fannie Mae cited no authority for the proposition that the immunity from liability to pay penalties or fines is jurisdictional."). From the two statements just quoted, it is apparent that the Eighth District did not understand or appreciate that FHFA entered the cease-and-desist order in its capacity as Regulator, not in its capacity as Conservator. Indeed, FHFA's enforcement authority may be exercised *only* in its capacity as Regulator. 12 U.S.C. 4635. Moreover, the Eighth District apparently failed to understand or appreciate that the statutory authority barring judicial review of FHFA's cease-and-desist orders is affirmatively set forth in Section 4635.

Although the court below correctly noted that the federal statutory Penalty Bar does not, in and of itself, divest it of jurisdiction over Plaintiff's complaint, that irrelevant observation misses the central point. It is the jurisdictional bar arising under Section 4635(b) by virtue of the Order—*not* the Penalty Bar of Section 4617(j)(4) applicable to FHFA conservatorships—that requires dismissal of this case. Once the Regulator issued its Order under Section 4631 enforcing its determination that Fannie Mae would violate federal law by paying any amount pursuant to R.C. 5301.36 (or pursuant to any judgment issued in connection with this litigation) —and expressly precluding it from doing so—the jurisdictional bar of Section 4635(b) divested the trial court of jurisdiction to take any action other than dismissal. It does not matter whether

the trial court (or appellate court) believes that the Regulator was wrong as to whether a judgment in this case would violate the Penalty Bar; both courts are statutorily barred from "review[ing]" the Order. Indeed, the whole point of the jurisdictional bar is to preclude courts from making that determination. *Compare Baytree Leasing Co., LLC v. Alliance Investors, LLC*, N.D.Ill. No. 11-cv-6619, U.S. Dist. LEXIS 72705, 8 (Mar. 21, 2012) ("Plaintiffs argue jurisdiction exists because they seek a finding that the Consent Order be a 'valid and continuing cease-and-desist order,' rather than seeking to specifically 'change' or affect the Consent Order. This argument is unpersuasive. The language of the [Federal Deposit Insurance] Act is clear: a district court is precluded from making a determination which would 'affect' or 'review' the Consent Order.").

### 2. The Eighth District Misconstrued, and Impermissibly Modified, the Order

Second, in reviewing the Order in violation of the jurisdictional bar, the Eighth District erroneously construed and impermissibly modified the Order to prohibit Fannie Mae from paying a judgment in this case only *to the extent that* the Eighth District independently determined that such a payment would violate the Penalty Bar. In so doing, the court below improperly exercised jurisdiction, which Congress expressly divested, to adjudicate whether any such judgment would, in fact, constitute a penalty prohibited under federal law, even though FHFA had already made that determination in the exercise of its regulatory authority. That is an implausible and impermissible re-writing of the Order, which plainly and expressly precludes Fannie Mae from paying *any* judgment.

In particular, the appellate court plainly misread or misunderstood the Order:

> In simple terms, the [Order] did not facially prohibit the trial court from entering a judgment against Fannie Mae in this case or generally imposing damages against Fannie Mae based on R.C. 5301.36(C). Instead, the order acknowledged the possibility of a

> judgment or imposition of damages in the pending action and expressed Congress's intent to limit Fannie Mae's liability for paying any amount in the nature of a penalty or fine pursuant to 12 U.S.C. 4617(j)(4).

*Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, at ¶ 11, Appx. A-013. But that is not what the Order says. To the contrary, the Order explicitly directs Fannie Mae not to pay *any* amount for *any* reason pursuant to R.C. 5301.36(C), *or* pursuant to *any* judgment entered in connection with this litigation, precisely to assure Fannie Mae's compliance with the Regulator's determination that any amount assessed under this state law or in connection with this litigation would be "in the nature of penalties" under federal law in violation of the Penalty Bar. The Order cannot plausibly be read other than as prohibiting Fannie Mae from making any payment "pursuant to *any* judgment in connection with [this litigation]," Order; Appx. A-039 (emphasis added).

This Order, by which the FHFA enforced its determination that any judgment granting relief sought by Plaintiff would constitute a penalty under governing federal law, may not be "review[ed]" or "affect[ed]" in any way. *See* 12 U.S.C. 4635(b). Because the relief Plaintiff seeks necessarily would require "review" of and would "affect" the Order, the court below lacked jurisdiction to review the Order—or to address, much less adjudicate, the array of collateral issues raised by Ms. Radatz, such as whether the Regulator correctly determined that statutory sums levied under R.C. 5301.36 would be "in the nature of penalties" under federal law. *See, e.g.*, *Rhoades*, 196 F.3d at 597 (noting that a declaration that an order is void or unenforceable is tantamount to modifying the order); *Law Offices La Ley Con John H. Ruiz*, 982 F.Supp.2d at 1312 ("As the Court lacks jurisdiction over Plaintiffs' claims, the Court does not address these additional arguments.").

**<u>Proposition of Law II</u>: FHFA's Order determining that R.C. 5301.36 is "in the nature of a penalty" under federal law is not inconsistent with *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2006-Ohio-1736, 825 N.E.2d 599.**

As demonstrated above, *no court* may review the substance of the Order. However, even if such review were possible, the legal determination enforced by the Order is correct, and *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2006-Ohio-1736, 825 N.E.2d 599, does not compel a contrary conclusion.

### A. Federal Law Governs Whether R.C. 5301.36 Imposes Amounts "In the Nature of Penalties" Within the Meaning of the Penalty Bar

The Penalty Bar of 12 U.S.C. 4617(j) states that the Conservator "shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." This Penalty Bar applies to Fannie Mae and Freddie Mac while under FHFA's conservatorship. *See Nevada*, 812 F.Supp.2d at 1218 (holding that, pursuant to section 4617(j)(4), "while under the conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is."); *Higgins v. BAC Home Loans Servicing, LP*, E.D.Ky.No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278, 8-9 (Mar. 31, 2014) (explaining that "when the Agency acts as conservator, it acts with complete control over Fannie Mae's assets. By prohibiting the imposition of fines and penalties on the Agency in any case in which the Agency is acting as a conservator or a receiver, HERA necessarily prohibits the imposition of fines and penalties on Fannie Mae") (internal quotation omitted).

The scope of the Penalty Bar—immunity granted by federal law—cannot be limited by the label given to any relief authorized under state law. Under controlling Supreme Court precedent, federal law governs whether the financial exaction Plaintiff seeks is a penalty. *See Missouri Pacific RR. Co. v. Ault*, 256 U.S. 554, 565, 41 S.Ct. 593, 65 L.Ed. 1087 (1921); *see*

*also National Loan Investors L.P. v. Town of Orange*, 204 F.3d 407, 412 (2d Cir.2000) (finding under the analogous statutory provision barring penalties against the FDIC that "[w]hether a charge constitutes a penalty for purposes of § 1825(b)(3) is a *federal question* informed by state law") (emphasis added); *Irving Indep. School Dist. v. Packard Properties, LTD*, 741 F.Supp. 120, 123 (N.D.Tex.1990) ("The determination whether the funds plaintiffs seek constitute penalties or interest within the meaning of § 1825(b)(3) is a federal question, the resolution of which is guided by reference to Texas state law"), *aff'd*, 970 F.2d 58 (5th Cir.1992); *United States v. Lewis Cty.*, 175 F.3d 671, 677 (9th Cir.1999) (applying *Ault*, reasoning, "there is a strong federal interest in the question whether the United States should be subject to state-imposed interest, penalties and foreclosures, and we doubt that Congress intended the outcome to depend upon varying characterizations of state law").

### B. Under Federal Law, Payments Under R.C. 5301.36 Are "In the Nature of Penalties"

The defining characteristic of a penalty under federal law is its objective to punish or deter, as opposed to compensate the wronged party for its pecuniary loss. *See Gabelli v. S.E.C.*, ___U.S.___, 133 S.Ct. 1216, 1223, 185 L.Ed.2d. 297 (2013) ("[T]his case involves penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers."); *Tull v. United States*, 481 U.S. 412, 422, 107 S.Ct. 1831 95 L.Ed.2d 365 (1987) (penalties are "intended to punish culpable individuals," not "to extract compensation or restore the status quo").

Federal courts have offered numerous formulations for distinguishing between penal and remedial statutes, but the inquiry principally turns on a simple question: Is the statute intended to compensate a party for an actual injury? If so, the statute is remedial. More than a century of precedent confirms this. The Supreme Court explored the distinction in *Huntington v. Attrill*,

146 U.S. 657, 673-74, 13 S.Ct. 224, 36 L.Ed. 1123 (1892), explaining that the question whether a statute is "penal" or "remedial" depends on "whether [the statute's] purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

The Sixth Circuit addressed the issue half a century later in *Bowles v. Farmers National Bank of Lebanon*, 147 F.2d 425 (6th Cir.1945), holding that a statute was penal because "the sum to be paid" was "so greatly in excess of the loss incurred that it [could not] be explained except upon the theory that the statute intend[ed] to subject the wrongdoer to an extraordinary liability not limited to the damage suffered." *Id.* at 429 (internal quotation marks omitted). The Sixth Circuit reaffirmed *Bowles* in *United States v. Price*, 290 F.2d 525 (6th Cir.1961), reiterating that a statute is remedial where it allows for recovery "to compensate for an injury," but that "[i]f, on the other hand, no direct injury has been done to the [plaintiff], the action is not for compensation but for the recovery of a penalty." *Id.* at 526. More recently, in *La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327 (6th Cir.2010), the Sixth Circuit continued to rely on *Bowles*, holding that a statutory award "constitutes a penalty" "if a sum of money is to be recovered by a third person . . . instead of a person injured, . . . or *if the sum exacted is greatly disproportionate to the actual loss*." *Id.* at 343 (quoting *Bowles*, 147 F.2d at 428) (emphasis added by *La Quinta*). The Eighth District misread *Bowles* when it concluded that it stands only for the narrow proposition that statutory damages are "in the nature of a penalty" when they are "to be recovered by the government." *Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, at ¶ 17, Appx. A-017. Nothing in *Bowles* suggests that sums recovered by individuals rather than the government are inherently compensatory, and the Sixth Circuit's later interpretation of *Bowles* in *La Quinta* is directly contrary to that of the Eighth District.

Under these longstanding tests for determining whether a statute is remedial or penal under federal law, the Regulator correctly determined that a judgment under R.C. 5301.36 would require payment of amounts "in the nature of penalties" under federal law. R.C. 5301.36 sanctions a failure to record a mortgage satisfaction and provides a statutory award of $250 for each violation without regard to any actual damages suffered. Indeed, the statute specifically authorizes the plaintiff to recover any actual damages sustained in addition to the $250 statutory sanction. *See* R.C. 5301.36(C) ("If the mortgagee fails to comply with division (B) of this section, the mortgagor may recover, in a civil action, damages of two hundred fifty dollars. *This division does not preclude or affect any other legal remedies that may be available to the mortgagor.*") (emphasis added).

The penal nature of this litigation is underscored by the fact that Plaintiff already has recovered the $250 provided for in the statute in connection with the same mortgage satisfaction at issue here, as a result of a settlement with Countrywide Home Loans, and the class definition, by its terms, makes no attempt to exclude individuals who already have received payment of $250 in a prior action against other defendants. *See* Claim Form & Check Signed by Rebekah R. Radatz, Appendix B to Fannie Mae's Eighth District Brief; *see also Radatz*, 176 Ohio App.3d 319, 2008-Ohio-1937, 891 N.E.2d 1236, at ¶ 4; Appx. A-025 (defining class as "All persons who, since May 9, 1997 and thereafter, paid off an Ohio residential mortgage * * * where [Fannie Mae] was the mortgagee at the time of the payoff and a satisfaction was not recorded[.]").

The Penalty Bar is not limited to liabilities expressly denominated as "penalties" or "fines," but sweeps more broadly to include sums "*in the nature* of penalties or fines." Courts have recognized that such language is "indicative of the drafters' intent to widen the scope of [a]

provision." *See Frye v. Thompson Steel Co.*, 657 F.3d 488, 496 (7th Cir.2011). In *Frye*, the Seventh Circuit interpreted a pension contract that required deductions for workers' compensation payments made for disabilities "in the nature of a permanent disability." *Id.* at 491. The court held that "the phrase 'in the nature of' suggests a broad and somewhat fluid concept" that could "include disabilities that are like permanent disabilities but are not permanent in the strictest sense." *Id.* at 496; *see also In re Maddigan*, 312 F.3d 589, 595 (2d Cir.2002) (according a "broad interpretation" to 11 U.S.C. 523(a)(5), which precludes a party from discharging through bankruptcy any liability "in the nature of alimony, maintenance or support."); *In re Kassicieh*, 425 B.R. 467, 481 (Bankr.S.D.Ohio 2010) (same). These cases reaffirm what is clear from the plain text of the Penalty Bar: Congress intended to shield FHFA conservatorships from "any" liabilities that have any significant punitive characteristics. The liabilities sought to be imposed by Radatz indeed have such punitive characteristics.

### C. *Higgins* Was Wrongly Decided and Does Not Control Here in Any Event

The Eighth District primarily relied on *Higgins v. BAC Home Loans Servicing, LP*, E.D.Ky. No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278 (Mar. 31. 2014), in holding that R.C. 5301.06 does not provide for penalties or fines under federal law. *Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, at ¶¶ 16, 18; Appx. A-016, A-018. The *Higgins* Court concluded that KRS 382.365(5), Kentucky's mortgage-assignment statute, does not impose liability in the nature of penalties or fines in violation of the Penalty Bar. While the *Higgins* Court acknowledged that the Kentucky law imposes minimum liability of $500 per violation—regardless of whether plaintiffs plead or show any actual harm—the court nevertheless concluded that the statute is not "penal" because it is "more properly viewed as a 'liquidated damages' provision." *Higgins*, 2014 U.S. Dist. LEXIS 43278, 16.

Fannie Mae and FHFA disagree with the holding of *Higgins*, and have sought and obtained interlocutory review before the Sixth Circuit.[1] In any event, the decision is inapposite here for two reasons. *First*, the Eighth District itself "acknowledged . . . that *Higgins* is distinguishable from the current facts, in that [in *Higgins*] FHFA never issued a consent order to protect Fannie Mae as it did in" the instant case. *Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, at ¶ 13; Appx. A-014. This is a fundamental and dispositive difference because, as explained above, Section 4631 bars review of the consent order.

*Second*, the Kentucky statute at issue in *Higgins* is markedly different from R.C. 5301.36. KRS 382.365(5) provides, in relevant part: "Damages under this subsection for failure to record an assignment pursuant to KRS 382.360(3) shall not exceed three (3) times the actual damages, plus attorney's fees and court costs, but in no event less than five hundred dollars ($500)." As *Higgins* noted: "As to the $500 minimum . . . the [Kentucky] statute does not permit an individual to recover both this sum and an amount based on actual damages. Individuals can either recover actual damages or the $500 minimum." 2014 U.S. Dist. LEXIS 43278, 16. Because the Kentucky statute permitted recovery of *either* trebled actual damages *or* the $500 minimum, but not both, the *Higgins* Court concluded that the statute provided for liquidated damages and therefore is "not properly characterized as a fine or penalty." *Id.* at 15. Even assuming *arguendo* that liquidated damages are not fines or penalties—a conclusion with which Fannie and FHFA disagree—the *Higgins* analysis is irrelevant because R.C. 5301.36, which is involved here, is in no way a liquidated-damages provision. R.C. 5301.36(C) expressly permits

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[1] On July 3, 2014, the *Higgins* Court certified its March 31, 2014 order for interlocutory review pursuant to 28 U.S.C. 1292(b). *See Higgins v. BAC Home Loans Servicing, LP*, E.D.Ky. Civ. A. No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 91362 (July 3, 2014). The Sixth Circuit accepted the appeal for interlocutory review on September 24, 2014. Order, *In re Fed. Hous. Fin. Agency, et al*, No. 14-506 (6th Cir. Sept. 24, 2014). Briefing currently is underway.

recovery of a $250 statutory sum *and* any actual damages. Because, unlike the Kentucky statute, R.C. 5301.36 *does* "permit an individual to recover both [a statutory] sum and an amount based on actual damages," *see Higgins*, 2014 U.S. Dist. LEXIS 43278, 16, it is not a liquidated-damages provision, and the reasoning of *Higgins* does not apply.

### D. *Rosette* Does Not Speak to Interpretation of the Penalty Bar

Despite the fact that federal law controls the analysis, the Eighth District instead incorrectly looked to a single decision involving state law to conclude erroneously that the payments were not penalties for purposes of federal law. *Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, at ¶ 14; Appx. A-015 (citing *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St. 3d 296, 2005-Ohio-1736, 825 N.E.2d 599). In *Rosette*, this Court held that the state legislature had not labeled the payments as a "penalty" or "forfeiture," reflecting the legislature's intent that the payments be treated as remedial for statute-of-limitations purposes. *Rosette* at ¶ 14. *Rosette* did not speak to whether payments under R.C. 5301.36 are "*in the nature* of penalties" for purposes of *federal* law (*i.e.* the Penalty Bar), a question that goes beyond the binary classification of R.C. 5301.36 as remedial or penal for limitations purposes at issue in *Rosette*.

In any event, *Rosette* is consistent with the conclusion that payments under R.C. 5301.36 are in the nature of penalties for purposes of the Penalty Bar. Significantly, Ohio law has long recognized that the nature of a statutory award or payment may differ depending on the perspective from which it is viewed. Under Ohio law, a payment may be considered compensation or damages when viewed from the perspective of the recipient, but a penalty when viewed from the perspective of the payor. Such was this Court's holding in *State ex rel. Emmich v. Industrial Commission*, 148 Ohio St. 658, 76 N.E.2d 714 (1947). The issue there was whether the additional award made to an injured worker when his injury was caused by the employer's failure to comply with a specific safety requirement was compensation or a penalty. This Court

held it was both: "The additional award provided by Section 35, Article II of the Constitution of Ohio, for failure by an employer to comply with any specific safety requirement for the protection of his employees is compensation so far as the employee is concerned, but is in the nature of a penalty so far as such award affects the employer." *Id.*, paragraph three of syllabus. It reached this conclusion even though the applicable provision of the Ohio Constitution labels the additional award "compensation."

In *Rosette*, it was not improper to look to the perspective of the plaintiff to determine whether the payment was properly viewed as damages or a penalty for limitations purposes because the inquiry was the amount of time the plaintiff had in which to commence his action. In this case, unlike *Rosette*, the nature of any judgment that might be awarded for a violation of R.C. 5301.36 must be determined from the perspective of the defendant payor, Fannie Mae, because the statutory Penalty Bar immunizes it for "any amounts in the nature of penalties or fines" as to it, regardless of whether the payment may be viewed as compensation to the plaintiff for other purposes.

Accordingly, the Eighth District's ruling cannot be squared with federal law, which compels the conclusion that exactions made pursuant to R.C. 5301.36(C) are in the nature of penalties and fines that are prohibited by the Penalty Bar. Holding that payments ordered pursuant to R.C. 5301.36(C) are in the nature of penalties is not inconsistent with Ohio law because state law has long recognized the need to look to the perspective of the party required to make the payment, not just the perspective of the recipient, in determining the nature of the payment.

## CONCLUSION

For the reasons stated above, Defendant-Appellant Fannie Mae respectfully requests that the Court reverse the decision of the Eighth District Court of Appeals and remand this case to the trial court for entry of dismissal.

Respectfully submitted,

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1/13/15 per tel. authority

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## CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was served by ordinary U.S. mail on this 13th day of January 2015, with courtesy copies by electronic mail, on the following:

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# Appendix

ORIGINAL

# IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| REBEKAH R. RADATZ, individually and on behalf of all others similarly situated<br><br>Plaintiff/Appellee,<br><br>v.<br><br>FEDERAL NATIONAL MORTGAGE ASSOCIATION<br><br>Defendant/Appellant. | ) | CASE NO. 14-1126<br><br>On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. CA-13-100205<br><br>Cuyahoga County Court of Common Pleas Case No. CV-03-507616 |

## NOTICE OF APPEAL OF DEFENDANT-APPELLANT FEDERAL NATIONAL MORTGAGE ASSOCIATION


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FILED
JUL 07 2014
CLERK OF COURT
SUPREME COURT OF OHIO


*Attorneys for Defendant-Appellant*
*Federal National Mortgage Association*

## NOTICE OF APPEAL

Defendant-Appellant Federal National Mortgage Association hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *Rebekah R. Radatz v. Federal National Mortgage Association*, Court of Appeals Case No. CA-13-100205 on May 22, 2014.

For the reasons set forth in the accompanying memorandum in support of jurisdiction, this case is of public or great general interest.

Dated: July 7, 2014

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal of Federal National Mortgage Association was served this 7th day of July, 2014, via U.S. First Class Mail, postage prepaid, on:

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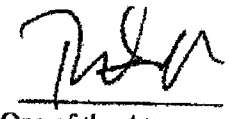

One of the Attorneys for
Federal National Mortgage Association

MAY 22 2014

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 100205**

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## REBEKAH R. RADATZ

PLAINTIFF-APPELLANT

vs.

## FEDERAL NATIONAL MORTGAGE ASSOCIATION

DEFENDANT-APPELLEE

CA13100205
84360443

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**JUDGMENT:**
REVERSED AND REMANDED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-03-507616

**BEFORE:** S. Gallagher, P.J., Rocco, J., and McCormack, J.

**RELEASED AND JOURNALIZED:** May 22, 2014

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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 22 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

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SEAN C. GALLAGHER, P.J.:

**{¶1}** Plaintiff-appellant Rebekah Radatz, individually and on behalf of the certified class members (collectively "Plaintiffs"), appeals from the trial court's decision to dismiss all claims against the defendant-appellee Federal National Mortgage Association ("Fannie Mae"), based on the claim that the trial court lacked subject matter jurisdiction. For the following reasons, we reverse the decision of the trial court and remand for further proceedings.

**{¶2}** In 2003, Radatz filed a complaint alleging individual and class action claims against Fannie Mae. Radatz alleged that Fannie Mae failed to comply with R.C. 5301.36(B) and file a satisfaction of a residential mortgage within 90 days from the date that she and other similarly situated mortgagors satisfied the loan debt. Radatz and the class, certified in December 2006, each sought to recover statutory damages in the amount of $250 pursuant to R.C. 5301.36(C). During discovery, it was determined that the class consisted of well over 100,000 individuals.

**{¶3}** "Fannie Mae was established in 1938 as a federal agency and was converted into a private corporation in 1968. * * * '[Fannie Mae is] structured as [a] private [corporation], but [is] federally chartered and play[s] an important role in the national housing market by making it easier for home buyers to obtain loans.'" *Fed. Hous. Fin. Agency v. Royal Bank of Scotland Group P.L.C.*, D.Conn. No. 3:11-cv-01383, 2012 U.S. Dist. LEXIS 116292, 3-4 (Aug. 17, 2012),

quoting *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 926, (D.C.Cir.2011). In response to the housing and mortgage market crisis in July 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), creating the Federal Housing Finance Agency ("FHFA"). *Id.* Congress granted the director of the FHFA conditional authority to place regulated entities, such as Fannie Mae, into conservatorship or receivership "'for the purpose of reorganizing, rehabilitating, or winding up [their] affairs.'" *Id.*, quoting 12 U.S.C. 4617(a). "On September 6, 2008, the Director of the FHFA placed Fannie Mae under the FHFA's temporary conservatorship with the objective of stabilizing the institutions so they could return to their normal business operations." *Id.*

{¶4} Meanwhile in September 2010, and after Fannie Mae's unsuccessful attempt to remove the action to federal court in light of HERA, Plaintiffs began compiling the list of class members. Plaintiffs completed the list — numbering over 100,000 — in February 2013 and promptly notified Fannie Mae. Seemingly in response, on March 13, 2013, Fannie Mae filed a motion to dismiss all claims, arguing that the trial court lacked jurisdiction because of a consent order issued by the FHFA director just four days earlier. It is undisputed that through the sole directive in the consent order, the FHFA director decreed that Fannie Mae was to cease and desist violating 12 U.S.C. 4617(j)(4), the so-called Penalty Bar provision that grants immunity to the FHFA from paying "any amount in the

nature of penalties and fines." Fannie Mae argued that through 12 U.S.C. 4635(b), the grant of immunity pursuant to 12 U.S.C. 4617(j)(4) became a jurisdictional concept, and therefore, the trial court lacked jurisdiction to affect any order issued by the FHFA director. In order to follow Fannie Mae's logic, it must be determined whether any damages awarded to the Plaintiffs would necessarily affect the consent order. Fannie Mae considers the statutory damages pursuant to R.C. 5301.36(C) to be in the nature of a fine or penalty. In light of Fannie Mae's argument, the trial court granted the Civ.R. 12(B)(1) motion and dismissed Plaintiffs' claims with prejudice on the basis that the trial court was divested of jurisdiction to enter a judgment in their favor against Fannie Mae.

**{¶5}** Plaintiffs timely appealed the trial court's decision, advancing two assignments of error. In the second assignment of error, the Plaintiffs claim the trial court erred in declining jurisdiction because the FHFA order violated the Plaintiffs' due process rights and was otherwise unenforceable. We need not address the second assignment of error. In their first assignment of error, Plaintiffs contend that neither 12 U.S.C. 4635(b) nor 4617(j)(4) divested the trial court of jurisdiction to resolve the claims, and therefore, the trial court erred by dismissing all claims against Fannie Mae. We find merit to Plaintiffs' first assignment of error. The trial court was not divested of jurisdiction. Accordingly, any claims advanced in the second assignment of error are moot.

**{¶6}** A trial court's decision on a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction is reviewed under a de novo standard of review. *Rheinhold v. Reichek*, 8th Dist. Cuyahoga No. 99973, 2014-Ohio-31, citing *Bank of Am. v. Macho*, 8th Dist. Cuyahoga No. 96124, 2011-Ohio-5495, ¶ 7. The sole question for our consideration, therefore, is whether the trial court erred in holding that the FHFA consent order divested the trial court of jurisdiction over the Plaintiffs' claim for statutory damages. After reviewing the record and arguments, we must answer that question in the affirmative.

**{¶7}** Plaintiffs' claims against Fannie Mae are predicated on the allegation that, pursuant to R.C. 5301.36(B), Fannie Mae failed to record the satisfaction of a residential mortgage within 90 days of the mortgagor satisfying the loan. As a result, Plaintiffs seek statutory damages in the amount of $250 per individual, injured mortgagor. R.C. 5301.36(C). Fannie Mae argues that pursuant to a federal statute, it is immune from liability for any penalties or fines provided for in the Ohio Satisfaction of Residential Mortgage Statute and because the director of the FHFA incorporated the immunity language of 12 U.S.C. 4617(j)(4) into a consent order, the trial court lacked jurisdiction to render a judgment upon the merits of Plaintiffs' statutory claim for damages. Inherent in that argument is the concept that any damages awarded pursuant to R.C. 5301.36(C) are in the nature of a penalty or fine.

{¶8} Congress granted the FHFA immunity from liability for any "amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax, or any recording or filing fees when due." 12 U.S.C. 4617(j)(4). Courts have construed this grant of immunity to apply to the imposition of fees or penalties against Fannie Mae while under the direction and control of the FHFA through conservatorship or receivership.[1] *Fed. Hous. Fin. Agency v. Chicago*, 962 F.Supp.2d 1044 (N.D.Ill.2013); *Nevada v. Countrywide Home Loans Servicing, L.P.*, 812 F.Supp.2d 1211 (D.Nev.2011); *Higgins v. BAC Home Loans Servicing, L.P.*, E.D.Ky. No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278 (Mar. 31, 2014). Congress, in establishing the FHFA's authority pursuant to HERA, further prescribed that no court "shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order" issued pursuant to 12 U.S.C. 4631 (cease and desist orders), or to "review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. 4635(b).

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[1]We need not address this issue for the purposes of the current case although it was raised by Plaintiffs in the briefing, and therefore, summarily rely on the interpretation of the statute as provided by other courts from around the country. The determination of whether Fannie Mae is included in the statutory grant of immunity conferred on the FHFA does not alter the disposition of the current case. Our resolution of that issue, therefore, is unnecessary for the purposes of this appeal.

**{¶9}** Before addressing the application of the federal statutes to the current facts, it is important to understand the extent of the FHFA consent order. On March 9, 2013, the acting director of the FHFA issued a consent order stating as follows:

> Pursuant to 12 U.S.C. § 4631 [(cease and desist proceedings)], [Fannie Mae] and Federal Home Loan Mortgage Corporation ("Freddie Mac") (together "the Enterprises") are hereby ordered to cease and desist from violating 12 U.S.C. § 4617(j)(4) by paying, for any reason, directly or indirectly, any fines or penalties *imposed* by any state mortgage satisfaction law on the Enterprises for noncompliance. Furthermore, Fannie Mae is ordered to cease and desist from violation 12 U.S.C. § 4617(j)(4) by paying, for any reason, directly or indirectly, *any amount* pursuant to Ohio Code 5301.36 or *pursuant to any judgment* in connection with the pending lawsuit styled Radatz v. Fed. Nat'l Mortgage Ass'n, Case No. CV-03-507616 (Ohio Com. Pleas).

(Emphasis added.) There are two important facets of the FHFA's consent order. First, as emphasized in the quoted language, the order states that Fannie Mae is prohibited from paying "any amount" pursuant to R.C. 5301.36(C) based on 12 U.S.C. 4617(j)(4). "It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Oakland v. Fed. Hous. Fin. Agency*, 716 F.3d 935, 939-940 (6th Cir.2013), quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). "'[W]hen the statutory language is plain, [the court] must enforce it according to its terms.'" *Id.*, quoting *Jimenez v. Quarterman*, 555 U.S. 113, 118, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009). "Analysis of any challenged action is

necessary to determine whether the action falls within the broad, but not infinite, conservator authority." *Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 994 (9th Cir.2013). "[I]f the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others," nothing in 12 U.S.C. 4617 prevents courts from delving into the FHFA's authority to act. *In re Fed. Home Loan Mtge. Corp. Derivative Litigation*, 643 F.Supp.2d 790, 799 (E.D.Va.2009).

**{¶10}** Thus, the language in the consent order cannot be read in isolation from the statutory language empowering FHFA's and Fannie Mae's immunity. The language of the consent order must be informed by a plain reading of 12 U.S.C. 4617(j)(4), which grants the FHFA immunity, but in doing so, modifies "any amount" with the descriptive, "in the nature of penalties or fines." Accordingly, inasmuch as the consent order states that Fannie Mae is prohibited from paying "any amounts in connection" with the underlying case, the extent of the cease and desist order is limited to Congress's grant of immunity to the FHFA and Fannie Mae, immunizing Fannie Mae from paying "any amounts" in the nature of penalties or fines in connection with the underlying case. Fannie Mae has cited no authority establishing the basis of the FHFA's authority to infinitely immunize Fannie Mae from paying any amounts stemming from any actions.

**{¶11}** Second, and more important, the consent order directly acknowledges the trial court's ability to grant a judgment in favor of Plaintiffs and against Fannie Mae based on a violation of Ohio's mortgage satisfaction law. In the consent order, the acting director of the FHFA expressly provided that Fannie Mae must cease and desist from paying any amount, subject to the modifier, in the nature of fines or penalties, pursuant to any judgment issued in the "pending" underlying case or any imposition of fines or penalties pursuant to a state's mortgage satisfaction laws. In simple terms, the consent order did not facially prohibit the trial court from entering a judgment against Fannie Mae in this case or generally imposing damages against Fannie Mae based on R.C. 5301.36(C). Instead, the order acknowledged the possibility of a judgment or imposition of damages in the pending action and expressed Congress's intent to limit Fannie Mae's liability for paying any amount in the nature of a penalty or fine pursuant to 12 U.S.C. 4617(j)(4). With this understanding, the scope of the party's arguments, as framed, is limited to whether any judgment in the trial court in the current case would affect the consent order, pursuant to 12 U.S.C. 4635(b), or whether a judgment entered would be in the nature of a penalty or fine levied against Fannie Mae, pursuant to 12 U.S.C. 4617(j)(4), the two jurisdictional bars advanced by Fannie Mae.

**{¶12}** In this case, the former inquiry is subsumed by the latter. The consent order merely orders Fannie Mae to cease and desist violating

12 U.S.C. 4617(j)(4). The only order that would affect the consent order would be an order forcing Fannie Mae to pay any amount in the nature of a penalty or fine stemming from this particular case. The prohibition against assessing penalties or fines against the FHFA or Fannie Mae, however, is not grounds to divest the court of jurisdiction. *See Higgins*, E.D.Ky. No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278 (noting that 12 U.S.C. 4617(j)(4) prohibits the imposition of fines or penalties against Fannie Mae or the FHFA); *Chicago*, 962 F.Supp.2d 1044 (12 U.S.C. 4617(j)(4), exempts the FHFA from the imposition of fines and penalties). Neither courts in *Higgins* or *Chicago* addressed 12 U.S.C. 4617(j)(4) from a jurisdictional standpoint, and tellingly, Fannie Mae cited no authority for the proposition that the immunity from liability to pay penalties or fines is jurisdictional.

**{¶13}** We acknowledge the fact that *Higgins* is distinguishable from the current facts in that the FHFA never issued a consent order to protect Fannie Mae as it did in the underlying case. We cannot escape the conclusion that the consent order appears to merely parrot the statutory immunity in an overt attempt to create a jurisdictional issue through 12 U.S.C. 4635(b), which is not expressly provided for in the statutory scheme granting the FHFA and, in this instance, Fannie Mae, immunity from paying any amounts in the nature of penalties or fines pursuant to 12 U.S.C. 4617(j)(4). Nevertheless, this issue is not currently before this court, and we assume for the sake of this appeal that

the conservator had authority to enter the consent order mimicking the immunity language of 12 U.S.C. 4617(j)(4).

**{¶14}** In order for a judgment in the underlying case to affect the consent order, Fannie Mae must assume that the damages awarded pursuant to R.C. 5301.36(C) are in the nature of a penalty or fine. In interpreting the Ohio General Assembly's intent, the Ohio Supreme Court held, however, that

> the statutory language is clear: R.C. 5301.36(C) expressly provides that a mortgagor "in a civil action" may sue for "damages." To conclude that R.C. 5301.36(C) creates a penalty, this court would have to delete the term "damages," a word used by the legislature, and insert the term "penalty" or "forfeiture," words not chosen by the legislature. Doing so would flout our responsibility to give effect to the words selected by the legislature in enacting a statute.

*Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599, ¶ 13. In that case, the Ohio Supreme Court faced the issue of whether to apply the one-year statute of limitations for an action upon a statute for a penalty or forfeiture, or the six-year limitations period for a statutory liability action. *Id.* at ¶ 11. Subsequently, the Ohio Supreme Court clarified that the compensatory damages imposed by R.C. 5301.36(C) are "more akin to stipulated or liquidated damages" rather than punitive damages that are meant to punish the wrongdoers. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 13. In the latter case, the court noted the difference between damages awarded in the

nature of compensatory damages and treble "damages," which serve a punitive objective. *Id.* at ¶ 14.

**{¶15}** Inasmuch as federal law controls this issue of whether damages are in the nature of a penalty or fine, in order to determine whether a "particular statutory provision is penal in nature," federal courts use a three-tiered analysis: (1) whether the purpose of the damages is to redress individual or public wrongs, (2) whether the recovery runs to the individual or the public, and (3) whether the recovery is disproportionate to the harm suffered. *Asklar v. Honeywell, Inc.*, 95 F.R.D. 419, 423 (D.Conn.1982); *Higgins*, E.D.Ky. No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278, at *13 (also noting that damages are commensurate with the injury received while a penalty has no reference to the actual loss sustained by the individual suing for recovery).

**{¶16}** On this point, the federal district court's decision in *Higgins* is instructive. In that case, Fannie Mae and the FHFA advanced the same arguments: that Fannie Mae is immune from any judgment because of the immunity from the imposition of fines or penalties afforded by 12 U.S.C. 4617(j)(4), albeit based on Kentucky's recording statute that establishes up to treble damages for any mortgagee's failure to record assignments of the mortgage. *Higgins* at *15. The *Higgins* court noted that the remedy provided by Kentucky's recording statute inured to the affected individual as a form of liquidated damages for the mortgagee's violation. *Id.* In light of that finding,

the court denied Fannie Mae and the FHFA's motion to dismiss. The federal district court could not only award damages, but those damages could be imposed against Fannie Mae and the FHFA because the damages were outside the scope of their statutory immunity. *Id.*

**{¶17}** In an attempt to deem Ohio's interpretation of its own statutory award of damages in conflict with the federal court's separate analysis used to determine whether an award is penal or compensatory, Fannie Mae cites *Bowles v. Farmers Natl. Bank of Lebanon, Kentucky*, 147 F.2d 425, 428 (6th Cir.1945), and *Schaefer v. H.B. Green Transp. Line, Inc.*, 232 F.2d 415, 418 (7th Cir.1956). Neither case supports Fannie Mae's position. *Bowles* is consistent with *Higgins*. The statute at issue in *Bowles* provided that the damages for any violations were to be recovered by the government, which converts damages into those in the nature of a penalty. *Bowles* at 428. On the other hand, *Schaefer* is simply inapplicable. In that case, the plaintiff shareholder impermissibly attempted to enforce an Illinois statutory provision against an Iowa corporation because no Iowa statute penalized the conduct that an Illinois statute penalized. *Schaefer* at 416. The facts and issues in *Schaefer* simply have no relevance to the facts or issues advanced in the current case. Fannie Mae offered no other analysis or evidence to demonstrate that any damages awarded pursuant to R.C. 5301.36(C) are in the nature of a penalty or a fine.

**{¶18}** The factual underpinnings of the current case are sufficiently similar to those addressed in *Higgins*, E.D.Ky. No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278. Not only has the Ohio Supreme Court referred to the damages awarded pursuant to R.C. 5301.36(C) as liquidated, and thus compensatory damages, but the damages inure to the benefit of the individuals aggrieved by Fannie Mae's failure to timely file the satisfaction of judgment as mandated by Ohio law. *See also Asklar*, 95 F.R.D. at 423. More important, unlike the statute at issue in *Higgins*, which awarded treble damages and yet was deemed compensatory in nature, R.C. 5301.36(C) does not award treble or other presumptively punitive damages.

**{¶19}** As a result, the result is the same either under Ohio's interpretation of its own statute or the federal analysis. R.C. 5301.36(C) awards compensatory damages. Those damages are not in the nature of a penalty or fine. Therefore, any judgment awarded by the lower court would not violate any immunity conferred by 12 U.S.C. 4617(j)(4). Any judgment or imposition of damages pursuant to R.C. 5301.36(C) is not in the nature of a penalty or fine. Therefore, the trial court erred by relying on the statutory immunity as grounds to dismiss Plaintiffs' complaint.

**{¶20}** Finally, in light of the determination that any judgment awarded in the lower court would not affect the immunity conferred by 12 U.S.C. 4617(j)(4), the court did not lack jurisdiction to dispose of the merits of the class

action complaint. Pursuant to 12 U.S.C. 4635(b), the trial court was divested of jurisdiction to issue any order that affected the FHFA consent order. Because any damages awarded through a judgment in the lower court action are not in the nature of a penalty or fine, the court had jurisdiction to dispose of the merits of all claims and to award damages to Plaintiffs based on Fannie Mae's alleged violation of R.C. 5301.36(C). Further, the FHFA consent order itself contemplated a judgment. It must logically follow that the trial court was not divested of jurisdiction. Any judgment in the underlying case could not possibly affect a consent order that specifically contemplated such a judgment being imposed in the first place.

**{¶21}** Plaintiffs in this case do not otherwise seek relief expressly banned by the FHFA consent order, or an injunction to prevent its enforcement, or declaratory relief to have the consent order declared invalid. *See Rex v. Chase Home Fin. L.L.C.*, 905 F.Supp.2d 1111 (C.D.Cal.2012) (deciding that based on a similar federal statutory scheme, the trial court possessed jurisdiction because the defendants did not provide the legal authority or evidence to show that the relief in the complaint actually affected a consent order). Plaintiffs merely seek the resolution of the merits of the class action claims that have been pending for more than a decade. Resolution of those claims will not affect or otherwise impede application of the consent order, and therefore, the trial court was not divested of jurisdiction in the underlying case.

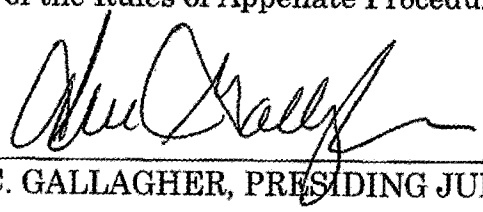
{¶22} For the foregoing reasons, we reverse the decision of the trial court dismissing all claims based on the lack of subject matter jurisdiction and we remand the case for further proceedings consistent herein.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



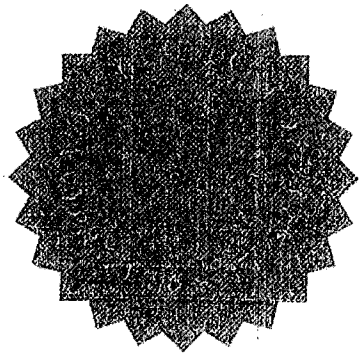
SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
TIM McCORMACK, J., CONCUR

CC 97 / 2783

**The State of Ohio,** Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 5/22/14 CA 100205 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 5/22/14 CA 100205 and that the same is correct transcript thereof.



**In Testimony Whereof,** I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 22 day of May A.D. 20 14

*ANDREA F. ROCCO, Clerk of Courts*

By _____ Deputy Clerk

2783

80105345

# IN THE COURT OF COMMON PLEAS
# CUYAHOGA COUNTY, OHIO

REBEKAH R.RADATZ
Plaintiff

FEDERAL NATIONAL MORTGAGE ASSOCIATION
Defendant

Case No: CV-03-507616

Judge: NANCY A FUERST

## JOURNAL ENTRY

89 DIS. W/ PREJ - FINAL

THIS MATTER IS BEFORE THE COURT ON DEFENDANT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S 03/13/13 MOTION TO DISMISS PURSUANT TO OHIO R. CIV. P. 12(H)(3) FOR LACK OF SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS.

PURSUANT TO THE FEDERAL HOUSING FINANCE AGENCY ("FHFA") CONSENT ORDER AGAINST DEFENDANT FEDERAL NATIONAL MORTGAGE ASSOCIATION ENTERED ON 03/09/13, AND 12 U.S.C § 4635(B), WHICH STATES, "NO COURT SHALL HAVE JURISDICTION TO AFFECT [EFFECT], BY INJUNCTION OR OTHERWISE, THE ISSUANCE OR ENFORCEMENT OF ANY NOTICE OR ORDER UNDER SECTION [...] OR TO REVIEW, MODIFY, SUSPEND, TERMINATE, OR SET ASIDE ANY SUCH NOTICE OR ORDER," THIS COURT FINDS THAT IT IS DIVESTED OF JURISDICTION OVER THIS MATTER.

ACCORDINGLY, DEFENDANT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S 03/13/13 MOTION TO DISMISS IS GRANTED. THERE IS NO JUST CAUSE FOR DELAY.

COURT COST ASSESSED TO THE PLAINTIFF(S).

Nafuerst 7/8/13
Judge Signature Date

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JUL 08 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By Deputy

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07/03/2013

[Cite as *Radatz v. Fed. Natl. Mtge. Assn.*, 176 Ohio App.3d 319, 2008-Ohio-1937.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 89056**

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**RADATZ,**

APPELLEE,

v.

**FEDERAL NATIONAL MORTGAGE ASSOCIATION,**

APPELLANT.

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**JUDGMENT:**
**AFFIRMED**

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-507616

**BEFORE:** Kilbane, J., Rocco, P.J., and Blackmon, J.

**RELEASED:** April 24, 2008

**JOURNALIZED:**

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MARY EILEEN KILBANE, Judge.

{¶ 1} Defendant-appellant, Federal National Mortgage Association ("FNMA"), appeals the judgment of the trial court granting plaintiff-appellee Rebekah R. Radatz's motion for class-action certification. For the following reasons, we affirm.

{¶ 2} The facts giving rise to the instant case began on December 6, 2000, when Radatz entered into a loan agreement regarding real property located at 819 Overlook Ridge Drive, Cleveland, Ohio.

{¶ 3} The mortgage was recorded on December 11, 2000. Radatz paid the mortgage in full on or about August 28, 2002. The entry of satisfaction was filed on November 29, 2002.

{¶ 4} On August 7, 2003, Radatz filed a class-action complaint against FNMA alleging violation of R.C. 5301.36, as it pertains to a failure to file entries of satisfaction. Radatz's proposed class consisted of the following:

> All persons who, since May 9, 1997 and thereafter, paid off residential mortgages recorded in Ohio, where Federal National Mortgage Association was the mortgagee at the time of mortgage satisfaction, and where the mortgage satisfaction was not recorded within 90 days.

{¶ 5} On September 16, 2003, FNMA filed a notice of removal to federal court. However, on September 27, 2004, the case was remanded from federal court.

{¶ 6} On October 22, 2004, FNMA filed a motion to dismiss plaintiff's complaint for failure to join indispensable parties, which was denied by the trial court.

Also, on October 22, 2004, FNMA filed a motion to dismiss plaintiff's complaint for failure to state a claim, which was denied by the trial court.

{¶ 7} On October 17, 2005, Radatz filed a motion for class certification. On November 18, 2005, Radatz filed a partial motion for summary judgment.

{¶ 8} On April 7, 2006, the trial court conducted a hearing on Radatz's motion for class certification. On November 1, 2006, the trial court granted Radatz's motion for class certification and denied Radatz's partial motion for summary judgment.

{¶ 9} On November 22, 2006, FNMA filed a notice of appeal and asserted three assignments of error for our review, arguing that the following prerequisites for class certification were not satisfied: superiority, identifiability, and predominance.

{¶ 10} We review class certification using an abuse-of-discretion standard. *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200. " 'The term "abuse of discretion" connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

> A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. It is at the trial level that decisions as to class definition and the scope of questions to be treated as class issues should be made. A finding of abuse of discretion *** should be made cautiously.

*Marks* at 201. However, the Supreme Court of Ohio further held:

> [T]he trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.

*Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67.

{¶ 11} "A trial judge must make seven affirmative findings before a case may be certified as a class action. Two prerequisites are implicitly required by Civ.R. 23, while five others are specifically set forth therein." *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91.

> The following seven elements must be satisfied before an action may be maintained as a class action under Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met.

*Hamilton*, at 71; see Civ.R. 23(A) and (B); *Warner*, at syllabus.

{¶ 12} With the standard for class certification established, we review FNMA's three assignments of error.

Assignment of Error Number One

> The trial court failed to recognize that the existence of parallel class actions against mortgage servicers, covering half of the putative Fannie Mae [FNMA] class members, precluded a finding of superiority here.

{¶ 13} FNMA argues that the element of superiority is not satisfied because the trial court failed to recognize the existence of parallel class actions against mortgage servicers that cover half of the putative FNMA class members. Civ.R. 23(B)(3) reads:

> An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition * * * (3) the court finds that the questions of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

{¶ 14} FNMA challenges the superiority element set forth in Civ.R. 23(B)(3) by arguing that it is not the proper defendant in the instant case. FNMA argues that it hired servicers to manage the mortgages and to file entries of satisfaction. Thus, FNMA argues that a superior method for fair and efficient adjudication would require the proposed class members to recover in pending class actions against the mortgage servicers.

{¶ 15} The trial court, in its rigorous opinion granting class certification, wrote:

> [T]he elements under Rule 23(B) of predominance and superiority are met. This case has threshold, basic common issues, which predominate over any relevant individual issues. The questions are identical and simple for all class members: a determination of the date that a class member's mortgage was paid off --a date that FNMA has in its records; and whether the release was recorded on time. That

information is available for each customer from FNMA's internal records (as well as from the county recorder-- as to recording dates).

{¶ 16} The trial court deemed class certification a superior method for fair and efficient adjudication for the following three reasons: first, a class action is a feasible way for class members to file and litigate a $250 claim, and it would also avoid duplication of the court's time and resources; second, there are no known similar cases against FNMA; and third, the instant case is more manageable than other class actions because each violation can be objectively shown and damages are set by statute.

{¶ 17} In applying Civ.R. 23(B)(3)(a) to the facts of this case, we find that the interest of members of the class in individually controlling the prosecution of separate actions is low because the recovery for each mortgagor is only $250, pursuant to R.C. 5301.36.

{¶ 18} Regarding Civ.R. 23(B)(3)(b) and the "extent and nature of any litigation concerning the controversy already commenced" by members of the class, we note that R.C. 5301.36(B) makes no provision for mortgage servicers: "[T]he mortgagee shall record the fact of the satisfaction in the appropriate county recorder's office and pay any fees required for the recording." Thus, mortgagors may recover only from the mortgagee, in this case the FNMA, and not from mortgage servicers. Thus, there are no known parallel lawsuits.

{¶ 19} Similarly, the pending class actions to which FNMA refers are actions in which the mortgage servicers are being held liable for acting in their capacity as a mortgagee, not as a mortgage servicer. The class members in the instant case cannot recover in those pending class actions because their mortgagee is FNMA. Thus, there are no parallel class actions against mortgage servicers that cover half of the putative FNMA class members.

{¶ 20} Furthermore, in applying Civ.R. 23(B)(3)(c), we find a high desirability to concentrate the litigation of the claims in a particular forum. In granting class certification in the instant case, the lower court can avoid duplication of time, effort, and resources in light of the fact that FNMA acted as mortgagee to 981,861 mortgages that were satisfied during the time frame set forth by the class-certification order. "In a situation such as the one at bar, the class action is the preferable method for dealing with evidence of a party's recurring malfeasance, because the ability to avoid duplication of a court's time, effort, and resources is an important and relevant consideration." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720.

{¶ 21} Civ.R. 23(B)(3)(d) addresses the difficulties likely to be encountered in the management of a class action. Here, the difficulties are small. FNMA kept track of all mortgage payments, including final payments from its mortgagors, lest a mortgagor default. Thus, logic follows that management of the instant class action is small because FNMA should have documentation of all final payments made.

{¶ 22} Furthermore, FNMA, as mortgagee, should also have documentation as to the date of entry of satisfaction. If FNMA does not have the documentation, the information should be easily obtained from the loan servicers that it contracted with to manage entries of satisfaction. It is inapposite to the instant case whether or not the loan servicers breached their contracts with FNMA by failing to timely file entries of satisfaction.

{¶ 23} Thus, the trial court did not abuse its discretion in finding the element of superiority satisfied in the instant case. FNMA's first assignment of error is overruled.

Assignment of Error Number Two

> The certification order fails to identify any objective means for ascertaining membership in the putative class.

{¶ 24} FNMA argues that the certification order fails to identify any objective means for ascertaining membership in the class. We disagree.

{¶ 25} Specifically, FNMA argues that it is not the mortgagee of record with the recorder's office, but rather the loan servicers are named instead, and thus the loan servicers are liable. However, there is no law requiring that the class members in this action be ascertained from public records. Nor is there a law requiring that the class-certification order identify the exact means by which class membership will be ascertained.

{¶ 26} FNMA's second assignment of error is overruled.

Assignment of Error Number Three

> The class record provides no basis for the trial court's assumption that common issues would predominate over individualized issues at trial.

{¶ 27} FNMA argues that common issues do not predominate over individualized issues in the instant case. We disagree.

{¶ 28} As we already noted, Civ.R. 23(B)(3) addresses the predominance and superiority elements in establishing class certification. Thus, we incorporate our analysis of FNMA's first assignment of error herein.

{¶ 29} Here, the common question is whether FNMA violated R.C. 5301.36 by failing to timely record a satisfaction of mortgage.

> The mere existence of different facts * * * is not by itself a bar to certification of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification where there are facts common to the class members.

*In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 10.

{¶ 30} We note:

> [T]he trial court is in the best position to consider the feasibility of gathering and analyzing class-wide evidence. Since the trial court's ruling did not exceed the bounds of reasonableness, we find that it acted within its discretion in resolving that there are common questions of fact among class members that can be presented in an efficient fashion.

Id. at ¶ 12.

{¶ 31} Here, the trial court will need to gather evidence regarding the mortgagor-mortgagee relationship, including identification of the mortgagors and the mortgagee, date of final payoffs, and the date the entries of satisfaction were filed. Simply because the trial court may be unable to ascertain all of this information within a single piece of evidence, such as a single computer system, as argued by FNMA, does not make this class action unduly burdensome. Nor does it prevent common issues from predominating over individualized issues in the instant case.

{¶ 32} Either FNMA is the mortgagee at payoff, or it is not. R.C. 5301.36 makes no provision for mortgage *servicers*. Thus, courts have not found issue with class-action lawsuits against the mortgagees where servicers were responsible for recording the satisfaction. In *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, the court stated that Charter One Bank, which was established as a federal savings association pursuant to the Home Owners' Loan Act, Section 1461 et seq., Title 12, U.S.Code, "through an agent subsidiary corporation, recorded the fact of the satisfaction * * * 117 days after the satisfaction." The Second Appellate District found no issue with a class-action lawsuit against a mortgagee when "[p]ursuant to a processing agreement, Security Connections, Inc. * * * was authorized by Fifth Third to process mortgage satisfactions." *Gilbert v. Fifth Third Bancorp*, 159 Ohio App.3d 56, 2004-Ohio-5829, 914. In each case, class actions against the mortgagee, not the "servicer," were upheld.

{¶ 33} Therefore, the trial court did not abuse its discretion in finding the element of predominance satisfied.

{¶ 34} FNMA's third assignment of error is overruled.

Judgment affirmed.

ROCCO, P.J., and BLACKMON, J., concur.

UNITED STATES OF AMERICA
FEDERAL HOUSING FINANCE AGENCY

| | | |
|---|---|---|
| **In the Matter of:**<br>**The Federal National Mortgage Association in the Conservatorship of FHFA and**<br>**The Federal Home Loan Mortgage Corporation in the Conservatorship of FHFA** | ) | **Stipulation and Consent No. 2013-001**<br>**To Order No. 2013-001** |

**STIPULATION AND CONSENT TO THE**
**ISSUANCE OF A CONSENT ORDER**

**WHEREAS,** the Federal Housing Finance Agency ("Agency") is charged with the supervision and oversight of the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") (together "the Enterprises") pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 4511 and 4513 ("Safety and Soundness Act"), as amended by the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (2008);

**WHEREAS,** on September 6, 2008, then-FHFA Director James B. Lockhart placed Fannie Mae and Freddie Mac into the conservatorship of FHFA pursuant to 12 U.S.C. § 4617;

**WHEREAS,** the Agency, based upon information derived from the exercise of its regulatory responsibilities, is of the opinion that grounds exist to initiate an administrative cease and desist proceeding against Fannie Mae and Freddie Mac pursuant to 12 U.S.C. § 4631;

**WHEREAS,** Fannie Mae and Freddie Mac, in the interests of compliance and cooperation, consent to the issuance of a consent order dated March 6, 2013 ("Order"), before the filing of any notice and before the finding of any issues of fact or law;

In consideration of the above premises, the Acting Director and, Fannie Mae and Freddie Mac, through their duly authorized representatives, hereby stipulate and agree to the following:

**Article I**

Jurisdiction

(a) Fannie Mae and Freddie Mac are in the FHFA's conservatorship and subject to the regulation and oversight of the Agency pursuant to sections 1311 and 1313 of the Safety and Soundness Act, 12 U.S.C. §§ 4511 and 4513.

(b) The Agency has authority pursuant to the Safety and Soundness Act, as amended by HERA, to initiate and maintain an administrative proceeding against Fannie Mae and Freddie Mac pursuant to 12 U.S.C. § 4631.

(c) Fannie Mae and Freddie Mac, in accordance with 12 U.S.C. § 4631(f), hereby consent and agree to the issuance of the Order by the Agency.

(d) Upon issuance, the Order shall be fully enforceable by the Agency in accordance with the authority and procedures set forth in Subtitle C of the Safety and Soundness Act, 12 U.S.C. §§ 4631-4642, as amended by HERA, and with any other supervisory powers afforded the Agency under the Safety and Soundness Act, HERA, or any other applicable statute.

**Article II**

Waivers

In entering into this Stipulation and Consent to the Issuance of an Order, Fannie Mae and Freddie Mac expressly waive each of the following:

(a) the right to the issuance and service of a Notice of Charges pursuant to 12 U.S.C. § 4631(a) and 12 C.F.R. § 1209.5(a)(i);

(b) all rights to a hearing on the record or a final agency decision pursuant to 12 U.S.C. § 4633 and 12 C.F.R. § 1209.5(a)(ii);

(c) any and all procedural rights available in connection with the issuance of the Order;

(d) the right to seek judicial review of the Order pursuant to 12 U.S.C. § 4634, or otherwise to challenge the validity of the Order; and,

(e) any and all claims against the Agency, including its employees and agents, and any other governmental entity for the award of fees, costs or expenses related to the Order, whether arising under common law, federal statutes or otherwise.

**Article III**

Miscellaneous

(a) Fannie Mae and Freddie Mac agree that the provisions of this Stipulation and the Order shall not inhibit, estop, bar or otherwise prevent the Agency from taking any other action affecting the Enterprises if, at any time, the Agency deems it appropriate to do so in order to fulfill its statutory supervisory responsibilities and that the Agency will transmit such guidance as it deems appropriate to provide direction to the Enterprises in meeting the obligations of the Order.

(b) Fannie Mae and Freddie Mac agree that, except as may be specifically set forth in the Order or in any future amendment thereto, their consent to issuance of the Order does not release them from any obligations that may have been or may be imposed on them by any rule, regulation or order issued by the Agency.

(c) Fannie Mae and Freddie Mac further agree that, notwithstanding the absence of mutuality of obligation or of consideration or of a contract, the Agency may enforce any of the commitments or obligations herein under its supervisory and enforcement powers conferred by 12 U.S.C. § 4511, 4513 and 4631-4642, and not as a matter of contract law.

(d) The laws of the United States of America shall govern the construction and validity of this Stipulation and of the Order.

(e) All references to the Agency in this Stipulation and the Order shall also mean any of the Agency's predecessors, successors or assigns.

(f) This Stipulation and the Order shall remain in effect until terminated, modified or suspended in writing by the Agency.

**IN TESTIMONY TO THIS STIPULATION AND CONSENT TO ISSUANCE OF A CONSENT ORDER**, the undersigned, authorized by the Agency and by Fannie Mae and Freddie Mac, as their representatives, have hereunto set their hand, this ____ day of March, 2013.

Bradley E. Lerman,
Executive Vice President, General Counsel
& Corporate Secretary
Federal National Mortgage Association

William H. McDavid
Executive Vice President, General Counsel
& Corporate Secretary
Federal Home Loan Mortgage Corporation

UNITED STATES OF AMERICA
FEDERAL HOUSING FINANCE AGENCY

**Consent Order No. 2013-1**

**In the Matter of:**
The Federal National Mortgage Association in the Conservatorship of FHFA and
The Federal Home Loan Mortgage Corporation in the Conservatorship of FHFA

**CONSENT ORDER**

Pursuant to 12 U.S.C. § 4631, the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") (together "the Enterprises") are hereby

1. ORDERED to CEASE and DESIST from violating 12 U.S.C. § 4617 (j)(4) by paying, for any reason, directly or indirectly, any fines or penalties imposed by any state mortgage satisfaction law on the Enterprises for noncompliance.

Furthermore, Fannie Mae is

2. ORDERED to CEASE AND DESIST from violating 12 U.S.C. § 4617 (j)(4) by paying, for any reason, directly or indirectly, any amount pursuant to Ohio Code 5301.36 or pursuant to any judgment in connection with the pending lawsuit styled *Radatz v. Fed. Nat'l Mortgage Ass'n,* Case No. CV-03-507616 (Ohio Com. Pleas).

**IN TESTIMONY WHEREOF**, the undersigned Acting Director of FHFA has hereunto set his hand on behalf of himself and FHFA this 9th day of March, 2013.

Edward J. DeMarco
Acting Director, Federal Housing Finance Agency

Director be modified, terminated, or set aside. The clerk of the court shall transmit a copy of the petition to the Director.

**(b) Filing of record**

Upon receiving a copy of a petition, the Director shall file in the court the record in the proceeding, as provided in section 2112 of title 28.

**(c) Jurisdiction**

Upon the filing of a petition, such court shall have jurisdiction, which upon the filing of the record by the Director shall (except as provided in the last sentence of section 4633(b)(2) of this title) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the Director.

**(d) Review**

Review of such proceedings shall be governed by chapter 7 of title 5.

**(e) Order to pay penalty**

Such court shall have the authority in any such review to order payment of any penalty imposed by the Director under this subchapter.

**(f) No automatic stay**

The commencement of proceedings for judicial review under this section shall not, unless specifically ordered by the court, operate as a stay of any order issued by the Director.

(Pub. L. 102-550, title XIII, § 1374, Oct. 28, 1992, 106 Stat. 3990; Pub. L. 110-289, div. A, title I, § 1153(b)(1)(C), July 30, 2008, 122 Stat. 2775.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a), was in the original "this title", meaning title XIII of Pub. L. 102-550, Oct. 28, 1992, 106 Stat. 3941, which is classified principally to this chapter. For complete classification of title XIII to the Code, see Short Title note set out under section 4501 of this title and Tables.

AMENDMENTS

2008—Subsec. (a). Pub. L. 110-289 substituted "4513b, 4636, or 4636a of this title" for "or 4636 of this title" and "this chapter" for "such section".

## § 4635. Enforcement and jurisdiction

**(a) Enforcement**

The Director may, in the discretion of the Director, apply to the United States District Court for the District of Columbia, or the United States district court within the jurisdiction of which the headquarters of the regulated entity is located, for the enforcement of any effective and outstanding notice or order issued under this subchapter or subchapter II, or request that the Attorney General of the United States bring such an action. Such court shall have jurisdiction and power to order and require compliance with such notice or order.

**(b) Limitation on jurisdiction**

Except as otherwise provided in this subchapter and sections 4619[1] and 4623 of this title, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order under section 4631, 4632, 4513b, 4636, or 4636a of this title, or subchapter II of this chapter, or to review, modify, suspend, terminate, or set aside any such notice or order.

(Pub. L. 102-550, title XIII, § 1375, Oct. 28, 1992, 106 Stat. 3990; Pub. L. 110-289, div. A, title I, § 1154, July 30, 2008, 122 Stat. 2775.)

REFERENCES IN TEXT

Section 4619 of this title, referred to in subsec. (b), was repealed by Pub. L. 110-289, div. A, title I, § 1145(b)(4), July 30, 2008, 122 Stat. 2767.

AMENDMENTS

2008—Subsec. (a). Pub. L. 110-289, § 1154(1), added subsec. (a) and struck out former subsec. (a). Prior to amendment, text read as follows: "The Director may request the Attorney General of the United States to bring an action in the United States District Court for the District of Columbia for the enforcement of any effective notice or order issued under this subchapter or subchapter II of this chapter or may, under the direction and control of the Attorney General, bring such an action. Such court shall have jurisdiction and power to order and require compliance herewith."

Subsec. (b). Pub. L. 110-289, § 1154(2), substituted "4513b, 4636, or 4636a of this title" for "or 4636 of this title".

## § 4636. Civil money penalties

**(a) In general**

The Director may impose a civil money penalty in accordance with this section on any regulated entity or any entity-affiliated party. The Director shall not impose a civil penalty in accordance with this section on any regulated entity or any entity-affiliated party for any violation that is addressed under section 4585(a) of this title.

**(b) Amount of penalty**

**(1) First tier**

A regulated entity or entity-affiliated party shall forfeit and pay a civil penalty of not more than $10,000 for each day during which a violation continues, if such regulated entity or party—

(A) violates any provision of this chapter, the authorizing statutes, or any order, condition, rule, or regulation under this chapter or any authorizing statute;

(B) violates any final or temporary order or notice issued pursuant to this chapter;

(C) violates any condition imposed in writing by the Director in connection with the grant of any application or other request by such regulated entity; or

(D) violates any written agreement between the regulated entity and the Director.

**(2) Second tier**

Notwithstanding paragraph (1), a regulated entity or entity-affiliated party shall forfeit and pay a civil penalty of not more than $50,000 for each day during which a violation, practice, or breach continues, if—

(A) the regulated entity or entity-affiliated party, respectively—

(i) commits any violation described in any subparagraph of paragraph (1);

(ii) recklessly engages in an unsafe or unsound practice in conducting the affairs of the regulated entity; or

[1] See References in Text note below.

**(1) Limitation on increase in obligations**

Limit any increase in, or order the reduction of, any obligations of the regulated entity, including off-balance sheet obligations.

**(2) Limitation on growth**

Limit or prohibit the growth of the assets of the regulated entity or require contraction of the assets of the regulated entity.

**(3) Acquisition of new capital**

Require the regulated entity to acquire new capital in a form and amount determined by the Director.

**(4) Restriction of activities**

Require the regulated entity to terminate, reduce, or modify any activity that the Director determines creates excessive risk to the regulated entity.

**(5) Improvement of management**

Take 1 or more of the following actions:

**(A) New election of board**

Order a new election for the board of directors of the regulated entity.

**(B) Dismissal of directors or executive officers**

Require the regulated entity to dismiss from office any director or executive officer who had held office for more than 180 days immediately before the date on which the regulated entity became undercapitalized. Dismissal under this subparagraph shall not be construed to be a removal pursuant to the enforcement powers of the Director under section 4636a of this title.

**(C) Employ qualified executive officers**

Require the regulated entity to employ qualified executive officers (who, if the Director so specifies, shall be subject to approval by the Director).

**(6) Reclassification from significantly to critically undercapitalized**

The Director may reclassify as critically undercapitalized a regulated entity that is classified as significantly undercapitalized (and the regulated entity shall be subject to the provisions of section 4617 of this title) if—

(A) the regulated entity does not submit a capital restoration plan that is substantially in compliance with section 4622 of this title within the applicable period or the Director does not approve the capital restoration plan submitted by the regulated entity; or

(B) the Director determines that the regulated entity has failed to make, in good faith, reasonable efforts necessary to comply with the capital restoration plan and fulfill the schedule for the plan approved by the Director.

**(7) Other action**

Require the regulated entity to take any other action that the Director determines will better carry out the purpose of this section than any of the other actions specified in this subsection.

**(c) Restriction on compensation of executive officers**

A regulated entity that is classified as significantly undercapitalized in accordance with section 4614 of this title may not, without prior written approval by the Director—

(1) pay any bonus to any executive officer; or

(2) provide compensation to any executive officer at a rate exceeding the average rate of compensation of that officer (excluding bonuses, stock options, and profit sharing) during the 12 calendar months preceding the calendar month in which the regulated entity became significantly undercapitalized.

(Pub. L. 102–550, title XIII, §1366, Oct. 28, 1992, 106 Stat. 3978; Pub. L. 110–289, div. A, title I, §1144, July 30, 2008, 122 Stat. 2733.)

AMENDMENTS

2008—Subsec. (a)(1). Pub. L. 110–289, §1144(3), substituted "A regulated entity" for "An enterprise".

Subsec. (a)(2)(A). Pub. L. 110–289, §1144(1)–(3), substituted "A regulated entity" for "An enterprise" in two places, "the regulated entity" for "the enterprise", and, in second sentence, "undercapitalized" for "undercapitalized enterprise".

Subsec. (a)(2)(B). Pub. L. 110–289, §1144(2), (4), substituted "a regulated entity" for "an enterprise" and "the regulated entity" for "the enterprise" wherever appearing.

Subsec. (b). Pub. L. 110–289, §1144(4), (5)(A), (B), substituted "Specific" for "Discretionary supervisory" in heading and "shall carry out this section by taking, at any time, 1 or more" for "may, at any time, take any" and "a regulated entity" for "an enterprise" in introductory provisions.

Subsec. (b)(1) to (4). Pub. L. 110–289, §1144(2), substituted "the regulated entity" for "the enterprise" wherever appearing.

Subsec. (b)(5). Pub. L. 110–289, §1144(5)(E), added par. (5). Former par. (5) redesignated (6).

Pub. L. 110–289, §1144(2), (4), substituted "a regulated entity" for "an enterprise" in introductory provisions and "the regulated entity" for "the enterprise" wherever appearing.

Subsec. (b)(6). Pub. L. 110–289, §1144(5)(C), (D), redesignated par. (5) as (6) and struck out former par. (6) which permitted the Director to appoint a conservator.

Subsec. (b)(7). Pub. L. 110–289, §1144(5)(F), added par. (7).

Subsec. (c). Pub. L. 110–289, §1144(6), added subsec. (c) and struck out former subsec. (c). Prior to amendment, text read as follows: "This section shall take effect upon the first classification of the enterprises within capital classifications that occurs under section 4614 of this title."

## §4617. Authority over critically undercapitalized regulated entities

**(a) Appointment of the Agency as conservator or receiver**

**(1) In general**

Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.

**(2) Discretionary appointment**

The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.

**(3) Grounds for discretionary appointment of conservator or receiver**

The grounds for appointing conservator or receiver for any regulated entity under paragraph (2) are as follows:

**(A) Assets insufficient for obligations**

The assets of the regulated entity are less than the obligations of the regulated entity to its creditors and others.

**(B) Substantial dissipation**

Substantial dissipation of assets or earnings due to—

(i) any violation of any provision of Federal or State law; or

(ii) any unsafe or unsound practice.

**(C) Unsafe or unsound condition**

An unsafe or unsound condition to transact business.

**(D) Cease and desist orders**

Any willful violation of a cease and desist order that has become final.

**(E) Concealment**

Any concealment of the books, papers, records, or assets of the regulated entity, or any refusal to submit the books, papers, records, or affairs of the regulated entity, for inspection to any examiner or to any lawful agent of the Director.

**(F) Inability to meet obligations**

The regulated entity is likely to be unable to pay its obligations or meet the demands of its creditors in the normal course of business.

**(G) Losses**

The regulated entity has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the regulated entity to become adequately capitalized (as defined in section 4614(a)(1) of this title).

**(H) Violations of law**

Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to—

(i) cause insolvency or substantial dissipation of assets or earnings; or

(ii) weaken the condition of the regulated entity.

**(I) Consent**

The regulated entity, by resolution of its board of directors or its shareholders or members, consents to the appointment.

**(J) Undercapitalization**

The regulated entity is undercapitalized or significantly undercapitalized (as defined in section 4614(a)(3) of this title), and—

(i) has no reasonable prospect of becoming adequately capitalized;

(ii) fails to become adequately capitalized, as required by—

(I) section 4615(a)(1) of this title with respect to a regulated entity; or

(II) section 4616(a)(1) of this title with respect to a significantly undercapitalized regulated entity;

(iii) fails to submit a capital restoration plan acceptable to the Agency within the time prescribed under section 4622 of this title; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 4622 of this title.

**(K) Critical undercapitalization**

The regulated entity is critically undercapitalized, as defined in section 4614(a)(4) of this title.

**(L) Money laundering**

The Attorney General notifies the Director in writing that the regulated entity has been found guilty of a criminal offense under section 1956 or 1957 of title 18 or section 5322 or 5324 of title 31.

**(4) Mandatory receivership**

**(A) In general**

The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that—

(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

**(B) Periodic determination required for critically undercapitalized regulated entity**

If a regulated entity is critically undercapitalized, the Director shall make a determination, in writing, as to whether the regulated entity meets the criteria specified in clause (i) or (ii) of subparagraph (A)—

(i) not later than 30 calendar days after the regulated entity initially becomes critically undercapitalized; and

(ii) at least once during each succeeding 30-calendar day period.

**(C) Determination not required if receivership already in place**

Subparagraph (B) does not apply with respect to a regulated entity in any period during which the Agency serves as receiver for the regulated entity.

**(D) Receivership terminates conservatorship**

The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter.

**(5) Judicial review**

**(A) In general**

If the Agency is appointed conservator or receiver under this section, the regulated entity may, within 30 days of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States Dis-

trict Court for the District of Columbia, for an order requiring the Agency to remove itself as conservator or receiver.

**(B) Review**

Upon the filing of an action under subparagraph (A), the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.

**(6) Directors not liable for acquiescing in appointment of conservator or receiver**

The members of the board of directors of a regulated entity shall not be liable to the shareholders or creditors of the regulated entity for acquiescing in or consenting in good faith to the appointment of the Agency as conservator or receiver for that regulated entity.

**(7) Agency not subject to any other Federal agency**

When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency.

**(b) Powers and duties of the Agency as conservator or receiver**

**(1) Rulemaking authority of the agency**

The Agency may prescribe such regulations as the Agency determines to be appropriate regarding the conduct of conservatorships or receiverships.

**(2) General powers**

**(A) Successor to regulated entity**

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to—

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

**(B) Operate the regulated entity**

The Agency may, as conservator or receiver—

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

**(C) Functions of officers, directors, and shareholders of a regulated entity**

The Agency may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of any regulated entity for which the Agency has been named conservator or receiver.

**(D) Powers as conservator**

The Agency may, as conservator, take such action as may be—

(i) necessary to put the regulated entity in a sound and solvent condition; and

(ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

**(E) Additional powers as receiver**

In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.

**(F) Organization of new enterprise**

The Agency may, as receiver for an enterprise, organize a successor enterprise that will operate pursuant to subsection (i).

**(G) Transfer or sale of assets and liabilities**

The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale.

**(H) Payment of valid obligations**

The Agency, as conservator or receiver, shall, to the extent of proceeds realized from the performance of contracts or sale of the assets of a regulated entity, pay all valid obligations of the regulated entity that are due and payable at the time of the appointment of the Agency as conservator or receiver, in accordance with the prescriptions and limitations of this section.

**(I) Subpoena authority**

**(i) In general**

**(I) Agency authority**

The Agency may, as conservator or receiver, and for purposes of carrying out any power, authority, or duty with respect to a regulated entity (including determining any claim against the regulated entity and determining and realizing upon any asset of any person in the course of collecting money due the regulated entity), exercise any power established under section 4588 of this title.

**(II) Applicability of law**

The provisions of section 4588 of this title shall apply with respect to the exercise of any power under this subparagraph, in the same manner as such provisions apply under that section.

**(ii) Subpoena**

A subpoena or subpoena duces tecum may be issued under clause (i) only by, or

with the written approval of, the Director, or the designee of the Director.

**(iii) Rule of construction**

This subsection shall not be construed to limit any rights that the Agency, in any capacity, might otherwise have under section 4517 or 4639 of this title.

**(J) Incidental powers**

The Agency may, as conservator or receiver—

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.

**(K) Other provisions**

**(i) Shareholders and creditors of failed regulated entity**

Notwithstanding any other provision of law, the appointment of the Agency as receiver for a regulated entity pursuant to paragraph (2) or (4) of subsection (a) and its succession, by operation of law, to the rights, titles, powers, and privileges described in subsection (b)(2)(A) shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter of the regulated entity or the Agency arising as a result of their status as stockholders or creditors, except for their right to payment, resolution, or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e).

**(ii) Assets of regulated entity**

Notwithstanding any other provision of law, for purposes of this section, the charter of a regulated entity shall not be considered an asset of the regulated entity.

**(3) Authority of receiver to determine claims**

**(A) In general**

The Agency may, as receiver, determine claims in accordance with the requirements of this subsection and any regulations prescribed under paragraph (4).

**(B) Notice requirements**

The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall—

(i) promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the date of publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the date of publication under clause (i).

**(C) Mailing required**

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the books of the regulated entity—

(i) at the last address of the creditor appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the books of the regulated entity, within 30 days after the discovery of such name and address.

**(4) Rulemaking authority relating to determination of claims**

Subject to subsection (c), the Director may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

**(5) Procedures for determination of claims**

**(A) Determination period**

**(i) In general**

Before the end of the 180-day period beginning on the date on which any claim against a regulated entity is filed with the Agency as receiver, the Agency shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

**(ii) Extension of time**

The period described in clause (i) may be extended by a written agreement between the claimant and the Agency.

**(iii) Mailing of notice sufficient**

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears—

(I) on the books of the regulated entity;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

**(iv) Contents of notice of disallowance**

If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain—

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

**(B) Allowance of proven claim**

The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

**(C) Disallowance of claims filed after filing period**

Claims filed after the date specified in the notice published under paragraph (3)(B)(i), or the date specified under paragraph (3)(C), shall be disallowed and such disallowance shall be final.

**(D) Authority to disallow claims**

**(i) In general**

The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

**(ii) Payments to less than fully secured creditors**

In the case of a claim of a creditor against a regulated entity which is secured by any property or other asset of such regulated entity, the receiver—

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the regulated entity; and

(II) may not make any payment with respect to such unsecured portion of the claim, other than in connection with the disposition of all claims of unsecured creditors of the regulated entity.

**(iii) Exceptions**

No provision of this paragraph shall apply with respect to—

(I) any extension of credit from any Federal Reserve Bank, Federal Home Loan Bank, or the United States Treasury; or

(II) any security interest in the assets of the regulated entity securing any such extension of credit.

**(E) No judicial review of determination pursuant to subparagraph (D)**

No court may review the determination of the Agency under subparagraph (D) to disallow a claim.

**(F) Legal effect of filing**

**(i) Statute of limitation tolled**

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

**(ii) No prejudice to other actions**

Subject to paragraph (10), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the date of the appointment of the receiver, subject to the determination of claims by the receiver.

**(6) Provision for judicial determination of claims**

**(A) In general**

The claimant may file suit on a claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the principal place of business of the regulated entity is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim), before the end of the 60-day period beginning on the earlier of—

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a regulated entity for which the Agency is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i).

**(B) Statute of limitations**

A claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver), and such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim, if the claimant fails, before the end of the 60-day period described under subparagraph (A), to file suit on such claim (or continue an action commenced before the appointment of the receiver).

**(7) Review of claims**

**(A) Other review procedures**

**(i) In general**

The Agency shall establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

**(ii) Criteria**

In establishing alternative dispute resolution processes, the Agency shall strive for procedures which are expeditious, fair, independent, and low cost.

**(iii) Voluntary binding or nonbinding procedures**

The Agency may establish both binding and nonbinding processes under this subparagraph, which may be conducted by any government or private party. All parties, including the claimant and the Agency, must agree to the use of the process in a particular case.

**(B) Consideration of incentives**

The Agency shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

**(8) Expedited determination of claims**

**(A) Establishment required**

The Agency shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who—

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any regulated entity for which the Agency has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

**(B) Determination period**

Before the end of the 90-day period beginning on the date on which any claim is filed in accordance with the procedures established under subparagraph (A), the Director shall—

(i) determine—

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established under paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

**(C) Period for filing or renewing suit**

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the date of appointment of the receiver, seeking a determination of the rights of the claimant with respect to such security interest after the earlier of—

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date on which the Agency denies the claim.

**(D) Statute of limitations**

If an action described under subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed under subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

**(E) Legal effect of filing**

**(i) Statute of limitation tolled**

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

**(ii) No prejudice to other actions**

Subject to paragraph (10), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action that was filed before the appointment of the receiver, subject to the determination of claims by the receiver.

**(9) Payment of claims**

**(A) In general**

The receiver may, in the discretion of the receiver, and to the extent that funds are available from the assets of the regulated entity, pay creditor claims, in such manner and amounts as are authorized under this section, which are—

(i) allowed by the receiver;

(ii) approved by the Agency pursuant to a final determination pursuant to paragraph (7) or (8); or

(iii) determined by the final judgment of any court of competent jurisdiction.

**(B) Agreements against the interest of the Agency**

No agreement that tends to diminish or defeat the interest of the Agency in any asset acquired by the Agency as receiver under this section shall be valid against the Agency unless such agreement is in writing and executed by an authorized officer or representative of the regulated entity.

**(C) Payment of dividends on claims**

The receiver may, in the sole discretion of the receiver, pay from the assets of the regulated entity dividends on proved claims at any time, and no liability shall attach to the Agency by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

**(D) Rulemaking authority of the Director**

The Director may prescribe such rules, including definitions of terms, as the Director deems appropriate to establish a single uniform interest rate for, or to make payments of post-insolvency interest to creditors holding proven claims against the receivership estates of the regulated entity, following satisfaction by the receiver of the principal amount of all creditor claims.

**(10) Suspension of legal actions**

**(A) In general**

After the appointment of a conservator or receiver for a regulated entity, the conservator or receiver may, in any judicial action or proceeding to which such regulated entity is or becomes a party, request a stay for a period not to exceed—

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver.

**(B) Grant of stay by all courts required**

Upon receipt of a request by the conservator or receiver under subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

**(11) Additional rights and duties**

**(A) Prior final adjudication**

The Agency shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Agency as conservator or receiver.

**(B) Rights and remedies of conservator or receiver**

In the event of any appealable judgment, the Agency as conservator or receiver—

(i) shall have all of the rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency, including removal to Federal court and all appellate rights; and

(ii) shall not be required to post any bond in order to pursue such remedies.

**(C) No attachment or execution**

No attachment or execution may issue by any court upon assets in the possession of the receiver, or upon the charter, of a regulated entity for which the Agency has been appointed receiver.

**(D) Limitation on judicial review**

Except as otherwise provided in this subsection, no court shall have jurisdiction over—

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets or charter of any regulated entity for which the Agency has been appointed receiver; or

(ii) any claim relating to any act or omission of such regulated entity or the Agency as receiver.

**(E) Disposition of assets**

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of a regulated entity for which the Agency has been appointed conservator or receiver, the Agency shall conduct its operations in a manner which—

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases; and

(iii) ensures adequate competition and fair and consistent treatment of offerors.

**(12) Statute of limitations for actions brought by conservator or receiver**

**(A) In general**

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law.

**(B) Determination of the date on which a claim accrues**

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Agency as conservator or receiver; or

(ii) the date on which the cause of action accrues.

**(13) Revival of expired state causes of action**

**(A) In general**

In the case of any tort claim described under clause (ii) for which the statute of limitations applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Agency as conservator or receiver, the Agency may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitations applicable under State law.

**(B) Claims described**

A tort claim referred to under clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the regulated entity.

**(14) Accounting and recordkeeping requirements**

**(A) In general**

The Agency as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Agency, maintain a full accounting of each conservatorship and receivership or other disposition of a regulated entity in default.

**(B) Annual accounting or report**

With respect to each conservatorship or receivership, the Agency shall make an annual accounting or report available to the Board, the Comptroller General of the United States, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

**(C) Availability of reports**

Any report prepared under subparagraph (B) shall be made available by the Agency upon request to any shareholder of a regulated entity or any member of the public.

**(D) Recordkeeping requirement**

After the end of the 6-year period beginning on the date on which the conservatorship or receivership is terminated by the Director, the Agency may destroy any records of such regulated entity which the Agency, in the discretion of the Agency, determines to be unnecessary, unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.

**(15) Fraudulent transfers**

**(A) In general**

The Agency, as conservator or receiver, may avoid a transfer of any interest of an entity-affiliated party, or any person determined by the conservator or receiver to be a debtor of the regulated entity, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Agency was appointed conservator or receiver, if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the regulated entity, the Agency, the conservator, or receiver.

**(B) Right of recovery**

To the extent a transfer is avoided under subparagraph (A), the conservator or receiver may recover, for the benefit of the regulated entity, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from—

(i) the initial transferee of such transfer or the entity-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

**(C) Rights of transferee or obligee**

The conservator or receiver may not recover under subparagraph (B) from—

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

**(D) Rights under this paragraph**

The rights under this paragraph of the conservator or receiver described under subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under title 11.

**(16) Attachment of assets and other injunctive relief**

Subject to paragraph (17), any court of competent jurisdiction may, at the request of the conservator or receiver, issue an order in accordance with rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the conservator or receiver under the control of the court, and appointing a trustee to hold such assets.

**(17) Standards of proof**

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (16) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

**(18) Treatment of claims arising from breach of contracts executed by the conservator or receiver**

**(A) In general**

Notwithstanding any other provision of this subsection, any final and unappealable judgment for monetary damages entered against the conservator or receiver for the breach of an agreement executed or approved in writing by the conservator or receiver after the date of its appointment, shall be paid as an administrative expense of the conservator or receiver.

**(B) No limitation of power**

Nothing in this paragraph shall be construed to limit the power of the conservator or receiver to exercise any rights under contract or law, including to terminate, breach, cancel, or otherwise discontinue such agreement.

**(19) General exceptions**

**(A) Limitations**

The rights of the conservator or receiver appointed under this section shall be subject to the limitations on the powers of a receiver under sections 4402 through 4407 of this title.[1]

**(B) Mortgages held in trust**

**(i) In general**

Any mortgage, pool of mortgages, or interest in a pool of mortgages held in trust, custodial, or agency capacity by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally, except that nothing in this clause shall be construed to expand or otherwise affect the authority of any regulated entity.

**(ii) Holding of mortgages**

Any mortgage, pool of mortgages, or interest in a pool of mortgages described in clause (i) shall be held by the conservator or receiver appointed under this section for the beneficial owners of such mortgage, pool of mortgages, or interest in accordance with the terms of the agreement creating such trust, custodial, or other agency arrangement.

**(iii) Liability of conservator or receiver**

The liability of the conservator or receiver appointed under this section for damages shall, in the case of any contingent or unliquidated claim relating to the mortgages held in trust, be estimated in accordance with the regulations of the Director.

**(c) Priority of expenses and unsecured claims**

**(1) In general**

Unsecured claims against a regulated entity, or the receiver therefor, that are proven to the satisfaction of the receiver shall have priority in the following order:

(A) Administrative expenses of the receiver.

(B) Any other general or senior liability of the regulated entity (which is not a liability described under subparagraph (C) or (D).[2]

(C) Any obligation subordinated to general creditors (which is not an obligation described under subparagraph (D)).

(D) Any obligation to shareholders or members arising as a result of their status as shareholder or members.

**(2) Creditors similarly situated**

All creditors that are similarly situated under paragraph (1) shall be treated in a similar manner, except that the receiver may take any action (including making payments) that does not comply with this subsection, if—

(A) the Director determines that such action is necessary to maximize the value of the assets of the regulated entity, to maximize the present value return from the sale or other disposition of the assets of the regulated entity, or to minimize the amount of any loss realized upon the sale or other disposition of the assets of the regulated entity; and

(B) all creditors that are similarly situated under paragraph (1) receive not less than the amount provided in subsection (e)(2).

**(3) Definition**

As used in this subsection, the term "administrative expenses of the receiver" includes—

[1] See References in Text note below.

[2] So in original. A second closing parenthesis probably should precede the period.

(A) the actual, necessary costs and expenses incurred by the receiver in preserving the assets of a failed regulated entity or liquidating or otherwise resolving the affairs of a failed regulated entity; and

(B) any obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the regulated entity.

**(d) Provisions relating to contracts entered into before appointment of conservator or receiver**

**(1) Authority to repudiate contracts**

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any regulated entity may disaffirm or repudiate any contract or lease—

(A) to which such regulated entity is a party;

(B) the performance of which the conservator or receiver, in its sole discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in its sole discretion, will promote the orderly administration of the affairs of the regulated entity.

**(2) Timing of repudiation**

The conservator or receiver shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

**(3) Claims for damages for repudiation**

**(A) In general**

Except as otherwise provided under subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—

(i) limited to actual direct compensatory damages; and

(ii) determined as of—

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

**(B) No liability for other damages**

For purposes of subparagraph (A), the term "actual direct compensatory damages" shall not include—

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

**(C) Measure of damages for repudiation of financial contracts**

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be—

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (e), except as otherwise specifically provided in this section.

**(4) Leases under which the regulated entity is the lessee**

**(A) In general**

If the conservator or receiver disaffirms or repudiates a lease under which the regulated entity was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined under subparagraph (B)) for the disaffirmance or repudiation of such lease.

**(B) Payments of rent**

Notwithstanding subparagraph (A), the lessor under a lease to which that subparagraph applies shall—

(i) be entitled to the contractual rent accruing before the later of the date on which—

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease;

(ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment, which shall be paid in accordance with this subsection and subsection (e).

**(5) Leases under which the regulated entity is the lessor**

**(A) In general**

If the conservator or receiver repudiates an unexpired written lease of real property of the regulated entity under which the regulated entity is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either—

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease, unless the lessee defaults under the terms of the lease after the date of such repudiation.

**(B) Provisions applicable to lessee remaining in possession**

If any lessee under a lease described under subparagraph (A) remains in possession of a leasehold interest under clause (ii) of subparagraph (A)—

(i) the lessee—

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease; and

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, and any damages which accrue after such date due to the nonperformance of any obligation of the regulated entity under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages

arising after such date as a result of the repudiation, other than the amount of any offset allowed under clause (i)(II).

**(6) Contracts for the sale of real property**

**(A) In general**

If the conservator or receiver repudiates any contract for the sale of real property and the purchaser of such real property under such contract is in possession, and is not, as of the date of such repudiation, in default, such purchaser may either—

(i) treat the contract as terminated by such repudiation; or

(ii) remain in possession of such real property.

**(B) Provisions applicable to purchaser remaining in possession**

If any purchaser of real property under any contract described under subparagraph (A) remains in possession of such property under clause (ii) of subparagraph (A)—

(i) the purchaser—

(I) shall continue to make all payments due under the contract after the date of the repudiation of the contract; and

(II) may offset against any such payments any damages which accrue after such date due to the nonperformance (after such date) of any obligation of the regulated entity under the contract; and

(ii) the conservator or receiver shall—

(I) not be liable to the purchaser for any damages arising after such date as a result of the repudiation, other than the amount of any offset allowed under clause (i)(II);

(II) deliver title to the purchaser in accordance with the provisions of the contract; and

(III) have no obligation under the contract other than the performance required under subclause (II).

**(C) Assignment and sale allowed**

**(i) In general**

No provision of this paragraph shall be construed as limiting the right of the conservator or receiver to assign the contract described under subparagraph (A), and sell the property subject to the contract and the provisions of this paragraph.

**(ii) No liability after assignment and sale**

If an assignment and sale described under clause (i) is consummated, the conservator or receiver shall have no further liability under the contract described under subparagraph (A), or with respect to the real property which was the subject of such contract.

**(7) Service contracts**

**(A) Services performed before appointment**

In the case of any contract for services between any person and any regulated entity for which the Agency has been appointed conservator or receiver, any claim of such person for services performed before the appointment of the conservator or receiver shall be—

(i) a claim to be paid in accordance with subsections (b) and (e); and

(ii) deemed to have arisen as of the date on which the conservator or receiver was appointed.

**(B) Services performed after appointment and prior to repudiation**

If, in the case of any contract for services described under subparagraph (A), the conservator or receiver accepts performance by the other person before the conservator or receiver makes any determination to exercise the right of repudiation of such contract under this section—

(i) the other party shall be paid under the terms of the contract for the services performed; and

(ii) the amount of such payment shall be treated as an administrative expense of the conservatorship or receivership.

**(C) Acceptance of performance no bar to subsequent repudiation**

The acceptance by the conservator or receiver of services referred to under subparagraph (B) in connection with a contract described in such subparagraph shall not affect the right of the conservator or receiver to repudiate such contract under this section at any time after such performance.

**(8) Certain qualified financial contracts**

**(A) Rights of parties to contracts**

Subject to paragraphs (9) and (10), and notwithstanding any other provision of this chapter (other than subsection (b)(9)(B) of this section), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right of that person to cause the termination, liquidation, or acceleration of any qualified financial contract with a regulated entity that arises upon the appointment of the Agency as receiver for such regulated entity at any time after such appointment;

(ii) any right under any security agreement or arrangement or other credit enhancement relating to one or more qualified financial contracts; or

(iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more contracts and agreements described in clause (i), including any master agreement for such contracts or agreements.

**(B) Applicability of other provisions**

Subsection (b)(10) shall apply in the case of any judicial action or proceeding brought against any receiver referred to under subparagraph (A), or the regulated entity for which such receiver was appointed, by any party to a contract or agreement described under subparagraph (A)(i) with such regulated entity.

**(C) Certain transfers not avoidable**

**(i) In general**

Notwithstanding paragraph (11), or any other provision of Federal or State law relating to the avoidance of preferential or fraudulent transfers, the Agency, whether acting as such or as conservator or receiver of a regulated entity, may not avoid any transfer of money or other property in connection with any qualified financial contract with a regulated entity.

**(ii) Exception for certain transfers**

Clause (i) shall not apply to any transfer of money or other property in connection with any qualified financial contract with a regulated entity if the Agency determines that the transferee had actual intent to hinder, delay, or defraud such regulated entity, the creditors of such regulated entity, or any conservator or receiver appointed for such regulated entity.

**(D) Certain contracts and agreements defined**

In this subsection the following definitions shall apply:

**(i) Qualified financial contract**

The term "qualified financial contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Agency determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph.

**(ii) Securities contract**

The term "securities contract"—

(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan, unless the Agency determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

(III) means any option entered into on a national securities exchange relating to foreign currencies;

(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(V) means any margin loan;

(VI) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) means any combination of the agreements or transactions referred to in this clause;

(VIII) means any option to enter into any agreement or transaction referred to in this clause;

(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII); and

(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

**(iii) Commodity contract**

The term "commodity contract" means—

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;

(VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) any combination of the agreements or transactions referred to in this clause;

(VIII) any option to enter into any agreement or transaction referred to in this clause;

(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or

(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

**(iv) Forward contract**

The term "forward contract" means—

(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than 2 days after the date on which the contract is entered into, including a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(II) any combination of agreements or transactions referred to in subclauses (I) and (III);

(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(IV) a master agreement that provides for an agreement or transaction referred to in subclauses (I), (II), or (III), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this clause, except that the master agreement shall be considered to be a forward contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), or (III); or

(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

**(v) Repurchase agreement**

The term "repurchase agreement" (including a reverse repurchase agreement)—

(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage-related securities (as such term is defined in section 78c of title 15), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined for purposes of this clause as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development, as determined by regulation or order adopted by the appropriate Federal banking authority), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

(II) does not include any repurchase obligation under a participation in a commercial mortgage loan, unless the Agency determines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (III);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this clause, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

**(vi) Swap agreement**

The term "swap agreement" means—

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option;

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(III) any combination of agreements or transactions referred to in this clause;

(IV) any option to enter into any agreement or transaction referred to in this clause;

(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subclause (I), (II), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

**(vii) Treatment of master agreement as one agreement**

Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.

**(viii) Transfer**

The term "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the equity of redemption of the regulated entity.

**(E) Certain protections in event of appointment of conservator**

Notwithstanding any other provision of this section, any other Federal law, or the law of any State (other than paragraph (10) of this subsection and subsection (b)(9)(B)), no person shall be stayed or prohibited from exercising—

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a regulated entity in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

(ii) any right under any security agreement or arrangement or other credit enhancement relating to 1 or more such qualified financial contracts; or

(iii) any right to offset or net out any termination values, payment amounts, or other transfer obligations arising under or in connection with such qualified financial contracts.

**(F) Clarification**

No provision of law shall be construed as limiting the right or power of the Agency, or authorizing any court or agency to limit or delay in any manner, the right or power of the Agency to transfer any qualified financial contract in accordance with paragraphs (9) and (10), or to disaffirm or repudiate any such contract in accordance with subsection (d)(1).

**(G) Walkaway clauses not effective**

**(i) In general**

Notwithstanding the provisions of subparagraphs (A) and (E), and sections 4403 and 4404 of this title, no walkaway clause shall be enforceable in a qualified financial contract of a regulated entity in default.

**(ii) Walkaway clause defined**

For purposes of this subparagraph, the term "walkaway clause" means a provision in a qualified financial contract that, after calculation of a value of a party's position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of the status of such party as a nondefaulting party.

**(9) Transfer of qualified financial contracts**

In making any transfer of assets or liabilities of a regulated entity in default which includes any qualified financial contract, the conservator or receiver for such regulated entity shall either—

(A) transfer to 1 person—

(i) all qualified financial contracts between any person (or any affiliate of such person) and the regulated entity in default;

(ii) all claims of such person (or any affiliate of such person) against such regulated entity under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such regulated entity);

(iii) all claims of such regulated entity against such person (or any affiliate of such person) under any such contract; and

(iv) all property securing, or any other credit enhancement for any contract described in clause (i), or any claim described in clause (ii) or (iii) under any such contract; or

(B) transfer none of the financial contracts, claims, or property referred to under subparagraph (A) (with respect to such person and any affiliate of such person).

**(10) Notification of transfer**

**(A) In general**

The conservator or receiver shall notify any person that is a party to a contract or transfer by 5:00 p.m. (Eastern Standard Time) on the business day following the date of the appointment of the receiver in the case of a receivership, or the business day following such transfer in the case of a conservatorship, if—

(i) the conservator or receiver for a regulated entity in default makes any transfer of the assets and liabilities of such regulated entity; and

(ii) such transfer includes any qualified financial contract.

**(B) Certain rights not enforceable**

**(i) Receivership**

A person who is a party to a qualified financial contract with a regulated entity may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) of this subsection or under section 4403 or 4404 of this title, solely by reason of or incidental to the appointment of a receiver for the regulated entity (or the insolvency or financial condition of the regulated entity for which the receiver has been appointed)—

(I) until 5:00 p.m. (Eastern Standard Time) on the business day following the date of the appointment of the receiver; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

**(ii) Conservatorship**

A person who is a party to a qualified financial contract with a regulated entity may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(E) of this subsection or under section 4403 or 4404 of this title, solely by reason of or incidental to the appointment of a conservator for the regulated entity (or the insolvency or financial condition of the regulated entity for which the conservator has been appointed).

**(iii) Notice**

For purposes of this paragraph, the conservator or receiver of a regulated entity shall be deemed to have notified a person who is a party to a qualified financial contract with such regulated entity, if the conservator or receiver has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A).

**(C) Business day defined**

For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

**(11) Disaffirmance or repudiation of qualified financial contracts**

In exercising the rights of disaffirmance or repudiation of a conservator or receiver with respect to any qualified financial contract to which a regulated entity is a party, the conservator or receiver for such institution shall either—

(A) disaffirm or repudiate all qualified financial contracts between—

(i) any person or any affiliate of such person; and

(ii) the regulated entity in default; or

(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).

**(12) Certain security interests not avoidable**

No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any regulated entity, except where such an interest is taken in contemplation of the insolvency of the regulated entity, or with the intent to hinder,

delay, or defraud the regulated entity or the creditors of such regulated entity.

**(13) Authority to enforce contracts**

**(A) In general**

Notwithstanding any provision of a contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of, or the exercise of rights or powers by, a conservator or receiver, the conservator or receiver may enforce any contract, other than a contract for liability insurance for a director or officer, or a contract or a regulated entity bond, entered into by the regulated entity.

**(B) Certain rights not affected**

No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a liability insurance contract for an officer or director, or regulated entity bond under other applicable law.

**(C) Consent requirement**

**(i) In general**

Except as otherwise provided under this section, no person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which a regulated entity is a party, or to obtain possession of or exercise control over any property of the regulated entity, or affect any contractual rights of the regulated entity, without the consent of the conservator or receiver, as appropriate, for a period of—

(I) 45 days after the date of appointment of a conservator; or

(II) 90 days after the date of appointment of a receiver.

**(ii) Exceptions**

This subparagraph shall not—

(I) apply to a contract for liability insurance for an officer or director;

(II) apply to the rights of parties to certain qualified financial contracts under subsection (d)(8); and

(III) be construed as permitting the conservator or receiver to fail to comply with otherwise enforceable provisions of such contracts.

**(14) Savings clause**

The meanings of terms used in this subsection are applicable for purposes of this subsection only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000 [7 U.S.C. 27 to 27f], the securities laws (as that term is defined in section 78c(a)(47) of title 15), and the Commodity Exchange Act [7 U.S.C. 1 et seq.].

**(15) Exception for Federal Reserve and Federal Home Loan Banks**

No provision of this subsection shall apply with respect to—

(A) any extension of credit from any Federal Home Loan Bank or Federal Reserve Bank to any regulated entity; or

(B) any security interest in the assets of the regulated entity securing any such extension of credit.

**(e) Valuation of claims in default**

**(1) In general**

Notwithstanding any other provision of Federal law or the law of any State, and regardless of the method which the Agency determines to utilize with respect to a regulated entity in default or in danger of default, including transactions authorized under subsection (i), this subsection shall govern the rights of the creditors of such regulated entity.

**(2) Maximum liability**

The maximum liability of the Agency, acting as receiver or in any other capacity, to any person having a claim against the receiver or the regulated entity for which such receiver is appointed shall be not more than the amount that such claimant would have received if the Agency had liquidated the assets and liabilities of the regulated entity without exercising the authority of the Agency under subsection (i).

**(f) Limitation on court action**

Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.

**(g) Liability of directors and officers**

**(1) In general**

A director or officer of a regulated entity may be held personally liable for monetary damages in any civil action described in paragraph (2) brought by, on behalf of, or at the request or direction of the Agency, and prosecuted wholly or partially for the benefit of the Agency—

(A) acting as conservator or receiver of such regulated entity; or

(B) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator.

**(2) Actions addressed**

Paragraph (1) applies in any civil action for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care than gross negligence, including intentional tortious conduct, as such terms are defined and determined under applicable State law.

**(3) No limitation**

Nothing in this subsection shall impair or affect any right of the Agency under other applicable law.

**(h) Damages**

In any proceeding related to any claim against a director, officer, employee, agent, attorney, accountant, appraiser, or any other party employed by or providing services to a regulated

entity, recoverable damages determined to result from the improvident or otherwise improper use or investment of any assets of the regulated entity shall include principal losses and appropriate interest.

**(i) Limited-life regulated entities**

**(1) Organization**

**(A) Purpose**

The Agency, as receiver appointed pursuant to subsection (a)—

(i) may, in the case of a Federal Home Loan Bank, organize a limited-life regulated entity with those powers and attributes of the Federal Home Loan Bank in default or in danger of default as the Director determines necessary, subject to the provisions of this subsection, and the Director shall grant a temporary charter to that limited-life regulated entity, and that limited-life regulated entity may operate subject to that charter; and

(ii) shall, in the case of an enterprise, organize a limited-life regulated entity with respect to that enterprise in accordance with this subsection.

**(B) Authorities**

Upon the creation of a limited-life regulated entity under subparagraph (A), the limited-life regulated entity may—

(i) assume such liabilities of the regulated entity that is in default or in danger of default as the Agency may, in its discretion, determine to be appropriate, except that the liabilities assumed shall not exceed the amount of assets purchased or transferred from the regulated entity to the limited-life regulated entity;

(ii) purchase such assets of the regulated entity that is in default, or in danger of default as the Agency may, in its discretion, determine to be appropriate; and

(iii) perform any other temporary function which the Agency may, in its discretion, prescribe in accordance with this section.

**(2) Charter and establishment**

**(A) Transfer of charter**

**(i) Fannie Mae**

If the Agency is appointed as receiver for the Federal National Mortgage Association, the limited-life regulated entity established under this subsection with respect to such enterprise shall, by operation of law and immediately upon its organization—

(I) succeed to the charter of the Federal National Mortgage Association, as set forth in the Federal National Mortgage Association Charter Act [12 U.S.C. 1716 et seq.]; and

(II) thereafter operate in accordance with, and subject to, such charter, this Act, and any other provision of law to which the Federal National Mortgage Association is subject, except as otherwise provided in this subsection.

**(ii) Freddie Mac**

If the Agency is appointed as receiver for the Federal Home Loan Mortgage Corporation, the limited-life regulated entity established under this subsection with respect to such enterprise shall, by operation of law and immediately upon its organization—

(I) succeed to the charter of the Federal Home Loan Mortgage Corporation, as set forth in the Federal Home Loan Mortgage Corporation Charter Act[1] [12 U.S.C. 1451 et seq.]; and

(II) thereafter operate in accordance with, and subject to, such charter, this Act, and any other provision of law to which the Federal Home Loan Mortgage Corporation is subject, except as otherwise provided in this subsection.

**(B) Interests in and assets and obligations of regulated entity in default**

Notwithstanding subparagraph (A) or any other provision of law—

(i) a limited-life regulated entity shall assume, acquire, or succeed to the assets or liabilities of a regulated entity only to the extent that such assets or liabilities are transferred by the Agency to the limited-life regulated entity in accordance with, and subject to the restrictions set forth in, paragraph (1)(B);

(ii) a limited-life regulated entity shall not assume, acquire, or succeed to any obligation that a regulated entity for which a receiver has been appointed may have to any shareholder of the regulated entity that arises as a result of the status of that person as a shareholder of the regulated entity; and

(iii) no shareholder or creditor of a regulated entity shall have any right or claim against the charter of the regulated entity once the Agency has been appointed receiver for the regulated entity and a limited-life regulated entity succeeds to the charter pursuant to subparagraph (A).

**(C) Limited-life regulated entity treated as being in default for certain purposes**

A limited-life regulated entity shall be treated as a regulated entity in default at such times and for such purposes as the Agency may, in its discretion, determine.

**(D) Management**

Upon its establishment, a limited-life regulated entity shall be under the management of a board of directors consisting of not fewer than 5 nor more than 10 members appointed by the Agency.

**(E) Bylaws**

The board of directors of a limited-life regulated entity shall adopt such bylaws as may be approved by the Agency.

**(3) Capital stock**

**(A) No agency requirement**

The Agency is not required to pay capital stock into a limited-life regulated entity or to issue any capital stock on behalf of a limited-life regulated entity established under this subsection.

**(B) Authority**

If the Director determines that such action is advisable, the Agency may cause cap-

ital stock or other securities of a limited-life regulated entity established with respect to an enterprise to be issued and offered for sale, in such amounts and on such terms and conditions as the Director may determine, in the discretion of the Director.

**(4) Investments**

Funds of a limited-life regulated entity shall be kept on hand in cash, invested in obligations of the United States or obligations guaranteed as to principal and interest by the United States, or deposited with the Agency, or any Federal reserve bank.

**(5) Exempt tax status**

Notwithstanding any other provision of Federal or State law, a limited-life regulated entity, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority.

**(6) Winding up**

**(A) In general**

Subject to subparagraphs (B) and (C), not later than 2 years after the date of its organization, the Agency shall wind up the affairs of a limited-life regulated entity.

**(B) Extension**

The Director may, in the discretion of the Director, extend the status of a limited-life regulated entity for 3 additional 1-year periods.

**(C) Termination of status as limited-life regulated entity**

**(i) In general**

Upon the sale by the Agency of 80 percent or more of the capital stock of a limited-life regulated entity, as defined in clause (iv), to 1 or more persons (other than the Agency)—

(I) the status of the limited-life regulated entity as such shall terminate; and

(II) the entity shall cease to be a limited-life regulated entity for purposes of this subsection.

**(ii) Divestiture of remaining stock, if any**

**(I) In general**

Not later than 1 year after the date on which the status of a limited-life regulated entity is terminated pursuant to clause (i), the Agency shall sell to 1 or more persons (other than the Agency) any remaining capital stock of the former limited-life regulated entity.

**(II) Extension authorized**

The Director may extend the period referred to in subclause (I) for not longer than an additional 2 years, if the Director determines that such action would be in the public interest.

**(iii) Savings clause**

Notwithstanding any provision of law, other than clause (ii), the Agency shall not be required to sell the capital stock of an enterprise or a limited-life regulated entity established with respect to an enterprise.

**(iv) Applicability**

This subparagraph applies only with respect to a limited-life regulated entity that is established with respect to an enterprise.

**(7) Transfer of assets and liabilities**

**(A) In general**

**(i) Transfer of assets and liabilities**

The Agency, as receiver, may transfer any assets and liabilities of a regulated entity in default, or in danger of default, to the limited-life regulated entity in accordance with and subject to the restrictions of paragraph (1).

**(ii) Subsequent transfers**

At any time after the establishment of a limited-life regulated entity, the Agency, as receiver, may transfer any assets and liabilities of the regulated entity in default, or in danger of default, as the Agency may, in its discretion, determine to be appropriate in accordance with and subject to the restrictions of paragraph (1).

**(iii) Effective without approval**

The transfer of any assets or liabilities of a regulated entity in default or in danger of default to a limited-life regulated entity shall be effective without any further approval under Federal or State law, assignment, or consent with respect thereto.

**(iv) Equitable treatment of similarly situated creditors**

The Agency shall treat all creditors of a regulated entity in default or in danger of default that are similarly situated under subsection (c)(1) in a similar manner in exercising the authority of the Agency under this subsection to transfer any assets or liabilities of the regulated entity to the limited-life regulated entity established with respect to such regulated entity, except that the Agency may take actions (including making payments) that do not comply with this clause, if—

(I) the Director determines that such actions are necessary to maximize the value of the assets of the regulated entity, to maximize the present value return from the sale or other disposition of the assets of the regulated entity, or to minimize the amount of any loss realized upon the sale or other disposition of the assets of the regulated entity; and

(II) all creditors that are similarly situated under subsection (c)(1) receive not less than the amount provided in subsection (e)(2).

**(v) Limitation on transfer of liabilities**

Notwithstanding any other provision of law, the aggregate amount of liabilities of a regulated entity that are transferred to, or assumed by, a limited-life regulated en-

tity may not exceed the aggregate amount of assets of the regulated entity that are transferred to, or purchased by, the limited-life regulated entity.

**(8) Regulations**

The Agency may promulgate such regulations as the Agency determines to be necessary or appropriate to implement this subsection.

**(9) Powers of limited-life regulated entities**

**(A) In general**

Each limited-life regulated entity created under this subsection shall have all corporate powers of, and be subject to the same provisions of law as, the regulated entity in default or in danger of default to which it relates, except that—

(i) the Agency may—

(I) remove the directors of a limited-life regulated entity;

(II) fix the compensation of members of the board of directors and senior management, as determined by the Agency in its discretion, of a limited-life regulated entity; and

(III) indemnify the representatives for purposes of paragraph (1)(B), and the directors, officers, employees, and agents of a limited-life regulated entity on such terms as the Agency determines to be appropriate; and

(ii) the board of directors of a limited-life regulated entity—

(I) shall elect a chairperson who may also serve in the position of chief executive officer, except that such person shall not serve either as chairperson or as chief executive officer without the prior approval of the Agency; and

(II) may appoint a chief executive officer who is not also the chairperson, except that such person shall not serve as chief executive officer without the prior approval of the Agency.

**(B) Stay of judicial action**

Any judicial action to which a limited-life regulated entity becomes a party by virtue of its acquisition of any assets or assumption of any liabilities of a regulated entity in default shall be stayed from further proceedings for a period of not longer than 45 days, at the request of the limited-life regulated entity. Such period may be modified upon the consent of all parties.

**(10) No Federal status**

**(A) Agency status**

A limited-life regulated entity is not an agency, establishment, or instrumentality of the United States.

**(B) Employee status**

Representatives for purposes of paragraph (1)(B), interim directors, directors, officers, employees, or agents of a limited-life regulated entity are not, solely by virtue of service in any such capacity, officers or employees of the United States. Any employee of the Agency or of any Federal instrumentality who serves at the request of the Agency as a representative for purposes of paragraph (1)(B), interim director, director, officer, employee, or agent of a limited-life regulated entity shall not—

(i) solely by virtue of service in any such capacity lose any existing status as an officer or employee of the United States for purposes of title 5 or any other provision of law; or

(ii) receive any salary or benefits for service in any such capacity with respect to a limited-life regulated entity in addition to such salary or benefits as are obtained through employment with the Agency or such Federal instrumentality.

**(11) Authority to obtain credit**

**(A) In general**

A limited-life regulated entity may obtain unsecured credit and issue unsecured debt.

**(B) Inability to obtain credit**

If a limited-life regulated entity is unable to obtain unsecured credit or issue unsecured debt, the Director may authorize the obtaining of credit or the issuance of debt by the limited-life regulated entity—

(i) with priority over any or all of the obligations of the limited-life regulated entity;

(ii) secured by a lien on property of the limited-life regulated entity that is not otherwise subject to a lien; or

(iii) secured by a junior lien on property of the limited-life regulated entity that is subject to a lien.

**(C) Limitations**

**(i)[3] In general**

The Director, after notice and a hearing, may authorize the obtaining of credit or the issuance of debt by a limited-life regulated entity that is secured by a senior or equal lien on property of the limited-life regulated entity that is subject to a lien (other than mortgages that collateralize the mortgage-backed securities issued or guaranteed by an enterprise) only if—

(I) the limited-life regulated entity is unable to otherwise obtain such credit or issue such debt; and

(II) there is adequate protection of the interest of the holder of the lien on the property with respect to which such senior or equal lien is proposed to be granted.

**(D) Burden of proof**

In any hearing under this subsection, the Director has the burden of proof on the issue of adequate protection.

**(12) Effect on debts and liens**

The reversal or modification on appeal of an authorization under this subsection to obtain credit or issue debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so issued, or any priority or lien so granted, to an entity that ex-

[3] So in original. No cl. (ii) has been enacted.

tended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the issuance of such debt, or the granting of such priority or lien, were stayed pending appeal.

**(j) Other Agency exemptions**

**(1) Applicability**

The provisions of this subsection shall apply with respect to the Agency in any case in which the Agency is acting as a conservator or a receiver.

**(2) Taxation**

The Agency, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the Agency shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of the value of such property, and the tax thereon, shall be determined as of the period for which such tax is imposed.

**(3) Property protection**

No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency.

**(4) Penalties and fines**

The Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

**(k) Prohibition of charter revocation**

In no case may the receiver appointed pursuant to this section revoke, annul, or terminate the charter of an enterprise.

(Pub. L. 102–550, title XIII, §1367, Oct. 28, 1992, 106 Stat. 3980; Pub. L. 110–289, div. A, title I, §1145(a), July 30, 2008, 122 Stat. 2734.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(4)(D) and (d)(8)(A), was in the original "this title", meaning title XIII of Pub. L. 102–550, Oct. 28, 1992, 106 Stat. 3941, which is classified principally to this chapter. For complete classification of title XIII to the Code, see Short Title note set out under section 4501 of this title and Tables.

Rule 65 of the Federal Rules of Civil Procedure, referred to in subsec. (b)(16), (17), is set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Sections 4402 through 4407 of this title, referred to in subsec. (b)(19)(A), was in the original "sections 402 through 407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4402 through 4407)", and was translated as reading "sections 402 through 407A of the Federal Deposit Insurance Corporation Improvement Act of 1991", meaning sections 402 to 407A of Pub. L. 102–242, which are classified to sections 4402 to 4407 of this title, to reflect the probable intent of Congress and the renumbering of section 407 of the Act as section 407A by Pub. L. 109–8, title IX, §906(d)(1), Apr. 20, 2005, 119 Stat. 169.

The Gramm-Leach-Bliley Act, referred to in subsec. (d)(14), is Pub. L. 106–102, Nov. 12, 1999, 113 Stat. 1338. For complete classification of this Act to the Code, see Short Title of 1999 Amendment note set out under section 1811 of this title and Tables.

The Legal Certainty for Bank Products Act of 2000, referred to in subsec. (d)(14), is title IV of H.R. 5660, as enacted by Pub. L. 106–554, §1(a)(5), Dec. 21, 2000, 114 Stat. 2763, 2763A–457, which is classified to sections 27 to 27f of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title of 2000 Amendment note set out under section 1 of Title 7 and Tables.

The Commodity Exchange Act, referred to in subsec. (d)(14), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

The Federal National Mortgage Association Charter Act, referred to in subsec. (i)(2)(A)(i)(I), is title III of act June 27, 1934, ch. 847, 48 Stat. 1252, which is classified generally to subchapter III (§1716 et seq.) of chapter 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1716 of this title and Tables.

This Act, referred to in subsec. (i)(2)(A)(i)(II), (ii)(II), is Pub. L. 102–550, Oct. 28, 1992, 106 Stat. 3672, known as the Housing and Community Development Act of 1992. For complete classification of this Act to the Code, see Short Title of 1992 Amendment note set out under section 5301 of Title 42, The Public Health and Welfare, and Tables.

The Federal Home Loan Mortgage Corporation Charter Act, referred to in subsec. (i)(2)(A)(ii)(I), probably means the Federal Home Loan Mortgage Corporation Act, title III of Pub. L. 91–351, July 24, 1970, 84 Stat. 451, which is classified generally to chapter 11A (§1451 et seq.) of this title. For complete classification of this Act to the Code, see Short Title and Statement of Purpose note set out under section 1451 of this title and Tables.

AMENDMENTS

2008—Pub. L. 110–289 amended section generally. Prior to amendment, section related to appointment of conservators for critically undercapitalized enterprises.

## §4618. Notice of classification and enforcement action

**(a) Notice**

Before taking any action referred to in subsection (b) of this section, the Director shall provide to the regulated entity written notice of the proposed action, which states the reasons for the proposed action and the information on which the proposed action is based.

**(b) Applicability**

The requirements of subsection (a) of this section shall apply to the following actions:

(1) Classification or reclassification of a regulated entity within a particular capital classification under section 4614 of this title.

(2) Any discretionary supervisory action pursuant to section 4615 of this title.

(3) Any discretionary supervisory action pursuant to section 4616 of this title except a decision to appoint a conservator under section 4616(b)(6)[1] of this title.

Notice of classification under paragraph (1) and notice of supervisory actions under paragraph (2) or (3) may be provided together in a single notice under subsection (a) of this section.

[1] See References in Text note below.

REGULATIONS

Pub. L. 110–289, div. A, title I, § 1109(b), July 30, 2008, 122 Stat. 2675, provided that: "Not later than the expiration of the 180-day period beginning on the effective date of this Act [probably means date of enactment of Pub. L. 110–289, approved July 30, 2008], the Director [of the Federal Housing Finance Agency] shall issue regulations pursuant to section 1369E(a) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 [12 U.S.C. 4624(a)] (as added by subsection (a) of this section) establishing the portfolio holdings standards under such section."

## SUBCHAPTER III—ENFORCEMENT PROVISIONS

### § 4631. Cease-and-desist proceedings

**(a) Issuance for unsafe or unsound practices and violations**

**(1) Authority of Director**

If, in the opinion of the Director, a regulated entity or any entity-affiliated party is engaging or has engaged, or the Director has reasonable cause to believe that the regulated entity or any entity-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of the regulated entity or the Office of Finance, or is violating or has violated, or the Director has reasonable cause to believe is about to violate, a law, rule, regulation, or order, or any condition imposed in writing by the Director in connection with the granting of any application or other request by the regulated entity or the Office of Finance or any written agreement entered into with the Director, the Director may issue and serve upon the regulated entity or entity-affiliated party a notice of charges in respect thereof.

**(2) Limitation**

The Director may not, pursuant to this section, enforce compliance with any housing goal established under subpart 2 of part B of subchapter I of this chapter, with section 4566 or 4567 of this title, with subsection (m) or (n) of section 1723a of this title, with subsection (e) or (f) of section 1456 of this title, or with paragraph (5) of section 1430(j) of this title.

**(b) Issuance for unsatisfactory rating**

If a regulated entity receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the Director may (if the deficiency is not corrected) deem the regulated entity to be engaging in an unsafe or unsound practice for purposes of subsection (a).

**(c) Procedure**

**(1) Notice of charges**

Each notice of charges under this section shall contain a statement of the facts constituting the alleged practice or violation and shall fix a time and place at which a hearing will be held to determine on the record whether an order to cease and desist from such practice or violation should issue, unless the party served with a notice of charges shall appear at the hearing personally or by a duly authorized representative, the party shall be deemed to have consented to the issuance of the cease and desist order.

**(2) Issuance of order**

If the Director finds on the record made at such hearing that any practice or violation specified in the notice of charges has been established (or the regulated entity or entity-affiliated party consents pursuant to section 4633(a)(4) of this title), the Director may issue and serve upon the regulated entity, executive officer, director, or entity-affiliated party an order requiring such party to cease and desist from any such practice or violation and to take affirmative action to correct or remedy the conditions resulting from any such practice or violation.

**(d) Affirmative action to correct conditions resulting from violations or activities**

The authority under this section and section 4632 of this title to issue any order requiring a regulated entity, executive officer, director, or entity-affiliated party to take affirmative action to correct or remedy any condition resulting from any practice or violation with respect to which such order is issued includes the authority to require a regulated entity or entity-affiliated party—

(1) make[1] restitution to, or provide reimbursement, indemnification, or guarantee against loss, if—

(A) such entity or party or finance facility was unjustly enriched in connection with such practice or violation; or

(B) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the Director;

(2) to require a regulated entity to seek restitution, or to obtain reimbursement, indemnification, or guarantee against loss;

(3) to restrict the growth of the regulated entity;

(4) to require the regulated entity to dispose of any loan or asset involved;

(5) to require the regulated entity to rescind agreements or contracts;

(6) to require the regulated entity to employ qualified officers or employees (who may be subject to approval by the Director at the direction of the Director); and

(7) to require the regulated entity to take such other action as the Director determines appropriate.

**(e) Authority to limit activities**

The authority to issue an order under this section or section 4632 of this title includes the authority to place limitations on the activities or functions of the regulated entity or entity-affiliated party or any executive officer or director of the regulated entity or entity-affiliated party.

**(f) Effective date**

An order under this section shall become effective upon the expiration of the 30-day period beginning on the service of the order upon the regulated entity, finance facility,,[2] executive officer, director, or entity-affiliated party concerned (except in the case of an order issued

[1] So in original. Probably should be "to make".

[2] So in original.

upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided in the order, except to the extent that the order is stayed, modified, terminated, or set aside by action of the Director or otherwise, as provided in this subchapter.

(Pub. L. 102–550, title XIII, § 1371, Oct. 28, 1992, 106 Stat. 3986; Pub. L. 110–289, div. A, title I, § 1151, July 30, 2008, 122 Stat. 2767.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a)(2), was in the original "this title", meaning title XIII of Pub. L. 102–550, Oct. 28, 1992, 106 Stat. 3941, which is classified principally to this chapter. For complete classification of title XIII to the Code, see Short Title note set out under section 4501 of this title and Tables.

AMENDMENTS

2008—Subsecs. (a), (b). Pub. L. 110–289, § 1151(1), added subsecs. (a) and (b) and struck out former subsecs. (a) and (b) which related to grounds for issuance against adequately capitalized enterprises and grounds for issuance against undercapitalized, significantly undercapitalized, and critically undercapitalized enterprises, respectively.

Subsec. (c)(1). Pub. L. 110–289, § 1151(2)(A), (3)(C), substituted "practice" for "conduct" in two places and inserted ", unless the party served with a notice of charges shall appear at the hearing personally or by a duly authorized representative, the party shall be deemed to have consented to the issuance of the cease and desist order" before period at end.

Subsec. (c)(2). Pub. L. 110–289, § 1151(2)(B), (3)(A), (C), inserted "or entity-affiliated party" before "consents" and substituted "director, or entity-affiliated party" for "or director", "the regulated entity" for "the enterprise" in two places, and "practice" for "conduct" wherever appearing.

Subsec. (d). Pub. L. 110–289, § 1151(3)(B), (C), (4)(A), in introductory provisions, substituted "a regulated entity" for "an enterprise", "director, or entity-affiliated party" for "or director", and "practice" for "conduct", and inserted "to require a regulated entity or entity-affiliated party" after "includes the authority".

Subsec. (d)(1). Pub. L. 110–289, § 1151(4)(B)(i), (ii), in introductory provisions, struck out "to require an executive officer or a director to" before "make restitution" and substituted "loss, if" for "loss to the enterprise to the extent that such person".

Subsec. (d)(1)(A). Pub. L. 110–289, § 1151(3)(C), (4)(B)(iii), inserted "such entity or party or finance facility" before "was unjustly" and substituted "practice" for "conduct".

Subsec. (d)(1)(B). Pub. L. 110–289, § 1151(4)(B)(iv), added subpar. (B) and struck out former subpar. (B) which read as follows: "engaged in conduct or a violation that would subject such person to a civil penalty pursuant to section 4636(b)(3) of this title;".

Subsec. (d)(2). Pub. L. 110–289, § 1151(3)(B), substituted "a regulated entity" for "an enterprise".

Subsec. (d)(3). Pub. L. 110–289, § 1151(3)(A), substituted "the regulated entity" for "the enterprise".

Subsec. (d)(4). Pub. L. 110–289, § 1151(3)(A), (4)(C), substituted "the regulated entity" for "the enterprise" and inserted "loan or" before "asset".

Subsec. (d)(5) to (7). Pub. L. 110–289, § 1151(3)(A), substituted "the regulated entity" for "the enterprise".

Subsec. (e). Pub. L. 110–289, § 1151(3)(A), (5), substituted "the regulated entity" for "the enterprise" in two places and inserted "or entity-affiliated party" before "or any executive" and before period at end.

Subsec. (f). Pub. L. 110–289, § 1151(6), substituted "regulated entity, finance facility," for "enterprise" and "director, or entity-affiliated party" for "or director".

## § 4632. Temporary cease-and-desist orders

### (a) Grounds for issuance

#### (1) In general

If the Director determines that the actions specified in the notice of charges served upon a regulated entity or any entity-affiliated party pursuant to section 4631(a) of this title, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of that entity, or is likely to weaken the condition of that entity prior to the completion of the proceedings conducted pursuant to sections 4631 and 4633 of this title, the Director may—

(A) issue a temporary order requiring that regulated entity or entity-affiliated party to cease and desist from any such violation or practice; and

(B) require that regulated entity or entity-affiliated party to take affirmative action to prevent or remedy such insolvency, dissipation, condition, or prejudice pending completion of such proceedings.

#### (2) Additional requirements

An order issued under paragraph (1) may include any requirement authorized under subsection 4631(d) of this title.

### (b) Effective date

An order issued pursuant to subsection (a) of this section shall become effective upon service upon the regulated entity, executive officer, director, or entity-affiliated party and, unless set aside, limited, or suspended by a court in proceedings pursuant to subsection (d) of this section, shall remain in effect and enforceable pending the completion of the proceedings pursuant to such notice and shall remain effective until the Director dismisses the charges specified in the notice or until superseded by a cease-and-desist order issued pursuant to section 4631 of this title.

### (c) Incomplete or inaccurate records

#### (1) Temporary order

If a notice of charges served under section 4631(a) or (b) of this title specifies on the basis of particular facts and circumstances that the books and records of the regulated entity served are so incomplete or inaccurate that the Director is unable, through the normal supervisory process, to determine the financial condition of the regulated entity or the details or the purpose of any transaction or transactions that may have a material effect on the financial condition of that regulated entity, the Director may issue a temporary order requiring—

(A) the cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(B) affirmative action to restore the books or records to a complete and accurate state.

#### (2) Effective period

Any temporary order issued under paragraph (1)—

(A) shall become effective upon service; and